No. 95-938-CFX Title: Immigration and Naturalization Service, Petitioner
v.
Yueh-Shaio Yang

Docketed: December 14, 1995 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Dec 13 1995	Petition for writ of certiorari filed. (Response due January 13, 1996)
	Jan 16 1996	Brief of respondent Yueh-Shaio Yang in opposition filed.
	Jan 31 1996	DISTRIBUTED. February 16, 1996
	Jan 31 1996	Reply brief of petitioner filed.
	Feb 20 1996	Petition GRANTED. SET FOR ARGUMENT October 9, 1996. **********
	Apr 1 1996	Order extending time to file brief of petitioner on the merits until May 3, 1996.
	May 3 1996	Brief of petitioner Immigration and Naturalization Service filed.
	May 3 1996	Joint appendix filed.
	May 3 1996	Brief amicus curiae of Washington Legal Foundation filed.
	May 31 1996	Order extending time to file brief of respondent on the merits until July 3, 1996.
	Jul 3 1996	Brief of respondent Yueh-Shaio Yang filed.
	Jul 3 1996	Brief amici curiae of American Immigration Lawyers Association, et al. filed.
	Aug 6 1996	Record filed.
	Aug 6 1996	CIRCULATED.
	Aug 8 1996	Reply brief of petitioner Immigration and Naturalization Service filed.
	Sep 26 1996	Record filed.
	Oct 9 1996	Supplemental brief of petitioner Immigration and Naturalization Service filed.
	Oct 9 1996	LODGING consisting often copies of Board of Appeals decision received from Solicitor General and distributed.
	Oct 15 1996	ARGUED.
	Oct 15 1996	Letter from the Solicitor General received and distributed

1 pp

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals improperly refused to allow the Attorney General to consider, in exercising her statutory discretion not to waive respondent's deportation, various acts of fraud that respondent committed before and after his initial fraudulent entry into the United States.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 58 F.3d 452. The opinion of the Board of Immigration Appeals (App., *infra*, 5a-11a) and the oral decision of the immigration judge (App., *infra*, 12a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1995. A petition for rehearing was denied on October 5, 1995. App., *infra*, 26a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 241(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1), provides in pertinent part as follows:

(a) Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:

(1) Excludable at time of entry or of adjustment of status or violates status

(A) Excludable aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable.

* * * * *

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens, described in section 1182(a)(6)(C)(i) of this title, whether willful or

innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D) [relating to certain aliens who assisted in Nazi persecution or engaged in genocide]) who—

(i) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title [relating to possession of valid labor certifications and valid immigrant visas, respectively] which were a direct result of that fraud or misrepresentation.

A waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive deportation based on the grounds of inadmissibility at entry directly resulting from such fraud or misrepresentation.

2. Section 212 of the INA, 8 U.S.C. 1182, provides in pertinent part as follows:

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

* * * * *

(6) Illegal entrants and immigration violators

* * * * *

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

* * * * * *

(i) Admission of immigrant excludable for fraud or willful misrepresentation of material fact

The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C) of this section—

(1) in the case of an immigrant who is the spouse, parent, or son or daughter of a United States citizen or of an immigrant lawfully admitted for permanent residence, or

(2) if the fraud or misrepresentation occurred at least 10 years before the date of the immigrant's application for a visa, entry, or adjustment of status and it is established to the satisfaction of the Attorney General that the admission to the United States of such immigrant would not be

contrary to the national welfare, safety, or security of the United States.

3. Relevant prior versions of Sections 241(f) and 212(a) of the INA, 8 U.S.C. 1251(f) and 1182(a), are set out in Appendix E hereto, beginning at page 28a.

STATEMENT

1. Respondent and his wife are natives of the People's Republic of China and citizens of Taiwan. App., *infra*, 13a. They were married in China in 1940 (*id.* at 16a), emigrated to Taiwan in 1945 (see *id.* at 8a-9a), and had six children together (*id.* at 8a).

In 1977, while in the United States as a visitor, respondent's wife was introduced by a friend to an individual who told her that if she were single and willing to pay or "invest" $60,000, she could obtain United States citizenship or permanent residency. App., *infra*, 6a, 15a. The couple accordingly obtained a divorce in Taiwan, and in 1978 respondent's wife returned to the United States and paid $60,000 (apparently obtained from respondent or from joint funds) to purchase a fraudulent United States birth certificate and passport in the name of Mary Wong. *Id.* at 6a-7a, 16a, 18a. Respondent then married "Mary Wong" in Taiwan, and subsequently sought and obtained entry to the United States as a lawful permanent resident on the ground that he was married to a United States citizen. *Id.* at 7a, 16a-17a.

Respondent and his wife thereafter successfully petitioned for immigrant status for four of their six adult children. App., *infra*, 16a-17a. One son purported to marry one of the daughters and attempted to bring her into the United States as his wife; both were later prosecuted for that and other immigration fraud. See *id.* at 17a. Another daughter obtained

United States citizenship through her own marriage to a citizen. *Ibid.* The family resided together in California in a house purchased by respondent. *Id.* at 19a.

In 1982, respondent applied for naturalization as a United States citizen. App., *infra*, 7a. In his application, respondent claimed that his wife, "Mary Wong," was a United States citizen by birth. In May 1984, respondent's wife began to worry about immigration fraud. She therefore abandoned her identity as "Mary Wong," and had her daughter file a petition to allow her to immigrate again, this time under her true name, as the parent of a United States citizen. In 1985, respondent and "Mary Wong" obtained a divorce in California. Later, after the Immigration and Naturalization Service (INS) commenced deportation proceedings against both respondent and his wife, they again remarried, this time using her true name. *Id.* at 7a-8a, 17a-18a.

2. In January 1992, the INS initiated deportation proceedings against respondent, partly on the ground that he had procured his initial entry into the United States by fraud or willful misrepresentation. App., *infra*, 13a; see 8 U.S.C. 1182(a)(6)(C)(i) (formerly 8 U.S.C. 1182(a)(19) (1988)), 1251(a)(1)(A). Respondent conceded that he was deportable, but he sought a waiver of deportation under Section 241(a)(1)(H) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(H). App., *infra*, 13a. Section 241(a)(1)(H) provides that the provisions of the INA relating to the deportation of aliens who sought to or did procure entry through fraud or willful misrepresentation of a material fact "may, in the discretion of the Attorney General, be waived" for an alien who (i) is the spouse, parent, or child of a United States citizen or lawful

permanent resident, and (ii) possessed an immigrant visa or equivalent documentation and was "otherwise admissible" to the United States at the time of entry.

At the deportation hearing, respondent "claimed that [he] had believed in the propriety of [his] method of entering the United States," and that he did not find it "unusual that [his] wife would adopt a different name, present another's birth certificate in order to obtain immigration benefits, or be required to obtain a sham divorce." App., *infra*, 8a. Respondent also claimed that he was indigent, and that he was not aware of his family's other acts of immigration fraud, including the "marriage" between two of his children (both of whom resided with him), until after they had been discovered by the INS. *Ibid.*

In October 1992, the immigration judge denied respondent's request for a waiver. App., *infra*, 12a-25a. Relying on judicial precedent that had, in turn, relied on the Attorney General's position concerning what factors should be considered in determining whether to waive deportation based on an initial fraud committed on entry into the United States, the judge noted that he "[did] not take into account the original fraud perpetrated against the United States Government by [respondent]; that is, * * * respondent's coming to this country and making claims falsely to be a spouse of a United States citizen." *Id.* at 14a (citing *Liwanag* v. *INS*, 872 F.2d 685, 687 (5th Cir. 1989)); see also App., *infra*, 21a. The immigration judge pointed out, however, that a waiver under Section 241(a)(1)(H) could "appropriately be denied if an alien *continues* in his fraud or in other subsequent acts from the original fraud or misrepresentations." App., *infra*, 14a-15a (emphasis added). The immigration judge accordingly based his decision in part

on respondent's acts of fraud after his initial entry. *Id.* at 20a, 23a, 24a-25a. In addition, the immigration judge relied on his conclusion that respondent's testimony was "not * * * candid," particularly in so far as he originally claimed indigency and a need for familial support, while after persistent questioning he admitted that he had "over $3 million in property and real estate[,] and liquid assets in cash, stocks, etc. of $700,000." *Id.* at 23a-24a.

The Board of Immigration Appeals (BIA) affirmed the immigration judge's decision. App., *infra*, 5a-11a. The BIA observed that, "[a]s with other discretionary applications for a waiver of deportability," Section 241(a)(1)(H) "necessitates a balancing of the alien's undesirability as a permanent resident [against] the social and humane considerations present to determine whether according him such relief is in the best interest of this country." App., *infra*, 10a (citing *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978) (discussing waiver of deportation under INA § 212(c), 8 U.S.C. 1182(c)). In this case, the BIA based its denial of relief on respondent's "acts of immigration fraud before and after his 1978 entry into the United States" (including participation in his wife's illegal immigration, two sham divorces, and intervening remarriage under a false name), and on his "apparent lack of candor during the deportation hearing regarding his knowledge of the significance of his fraud." App., *infra*, 10a. Although the BIA recognized (*id.* at 11a) that respondent had family and business ties to the United States that might have supported a waiver, it concluded (*id.* at 10a-11a) that those equities were outweighed by respondent's "pattern of violating this country's immigration laws through fraud." *Id.* at 10a-11a.

3. The court of appeals granted respondent's petition for review, vacated the BIA's decision, and remanded the case for further proceedings. App., *infra*, 1a-4a. In so doing, the court applied its own version of the rule applied by the immigration judge (App., *infra*, 14a-15a) and the BIA (*id.* at 10a), that the initial fraud at entry should be disregarded in balancing the equities with respect to a waiver under Section 241(a)(1)(H). The court held that, in balancing those equities in this case, the Board should not have considered respondent's participation in his wife's illegal entry into this country, including his sham divorces and marriages, because those acts were "inextricably intertwined with [respondent's] own efforts to secure entry into the country and must be considered part of [his] initial fraud." App., *infra*, 2a. Furthermore, the court held that the Board should not have considered respondent's fraudulent application for naturalization, which it held "must [also] be considered an extension of the initial fraud." *Id.* at 2a-3a. The Court remanded the case, however, because it concluded that "being untruthful with the immigration court is an adverse factor which may be properly considered by the BIA." *Id.* at 3a.

The court denied the government's petition for rehearing, and rejected a suggestion of rehearing en banc. App., *infra*, 26a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that the Attorney General abused her discretion by refusing to waive the deportation of an alien who not only entered this country through fraud and misrepresentation, but also engaged in a pattern of serious immigration fraud both before and after that entry—culminating

in a fraudulent application for naturalization as a citizen of the United States. The Ninth Circuit's decision ignores the text and history of the relevant provision of the Immigration and Nationality Act (INA), and it conflicts with the decisions of other courts of appeals. If uncorrected, the decision below will impede the proper and uniform administration of the immigration laws, thereby creating unfairness and imposing a serious practical burden on immigration authorities. It will also require the retention in this country of individuals whom Congress has declared to be deportable, and who the Attorney General believes are unworthy of a favorable exercise of her statutory discretion to waive deportation. The court of appeals' error thus warrants review and correction by this Court.

1. An alien who procured his initial entry into the United States "by fraud or [by] willfully misrepresenting a material fact," 8 U.S.C. 1182(a)(6)(C)(i), is normally subject to deportation once the deception is discovered. 8 U.S.C. 1251(a)(1)(A). If the alien is the spouse, parent, or child of a citizen or lawful resident alien, however, and if, at the time of entry, he would have been eligible for admission to the United States but for the fraud or misrepresentation, then deportation may be waived, "in the discretion of the Attorney General." 8 U.S.C. 1251(a)(1)(H). A decision not to grant such a waiver, like other discretionary determinations made during administrative deportation proceedings, may be reviewed by a court of appeals under 8 U.S.C. 1105a only for abuse of discretion. *Foti* v. *INS*, 375 U.S. 217, 226-232 (1963).

The waiver provision at issue here was originally enacted in 1957, and was reenacted as Section 241(f) of the INA in 1961. Act of Sept. 11, 1957, Pub L. No. 85-

316, § 7, 71 Stat. 640; Act of Sept. 26, 1961, Pub L. No. 87-301, § 16, 75 Stat. 655; see *INS* v. *Errico*, 385 U.S. 214, 220-223 (1966). In each instance, Congress made the waiver mandatory when the ground for deportation was that an alien had previously entered the United States through fraud or misrepresentation. See 8 U.S.C. 1251(f) (1964); see also *Errico*, 385 U.S. at 224-225; *Reid* v. *INS*, 420 U.S. 619, 622-631 (1975).[1]

Over the ensuing 20 years, the mandatory waiver provison became "a major source of controversy and litigation." H.R. Rep. No. 264, 97th Cong., 1st Sess. 25 (1981). Although Congress had "original[ly] inten[ded] * * * simply to waive relatively minor grounds for deportation" for aliens with close citizen or permanent resident relatives, the scope of the waiver became "increasingly unclear" as litigants sought to expand the provision into "a charter of amnesty, waiving all restrictions for those who had entered the United States through fraud." *Ibid.* By 1975, this Court was moved to observe that decisions of the lower courts under Section 241(f) might be "summarized in the language of Macduff: 'Confusion now hath made his masterpiece.'" *Reid*, 420 U.S. at 628. Four years later, the Acting Commissioner of the INS echoed that assessment when he pointed out in congressional testimony that questions concerning the waiver provision had reached this Court twice (in *Errico* and *Reid*) with "no clear resolution, and

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[1] Both Acts also provided for discretionary waiver of exclusion on the basis of fraud or misrepresentation in the case of certain aliens still outside the United States who had a citizen or lawful resident spouse, parent, or child. See 8 U.S.C. 1251a (1958); 8 U.S.C. 1182(i) (1964); H.R. Rep. No. 1199, 85th Cong., 1st Sess. 10-11 (1957); S. Rep. No. 1057, 85th Cong., 1st Sess. 5 (1957).

differing administrative and judicial interpretations ha[d] left the law in a state of confusion which ma[de] it virtually impossible for the INS to uniformly administer" the provision. *Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 4 (1979) (hereafter *Efficiency of the INS*).

In light of that experience, legislation was proposed in Congress in 1979 to repeal Section 241(f) entirely. See *Efficiency of the INS* 7-8. The INS, however, recommended instead that the waiver provision be clarified and made "discretionary with the Attorney General," which would "allow[] the INS to consider relief in cases where the misrepresentation [which would otherwise require deportation] may be outweighed by family ties." *Id.* at 4; see *id.* at 7-8. Congress ultimately accepted that suggestion, and the relevant committee report reflects the expectation that clarifying Section 241(f) and "making the waiver discretionary * * * should obviate the need for further litigation, and promote the uniform administration" of the waiver provision. H.R. Rep. No. 264, *supra*, at 25.

The discretionary nature of the amended waiver provision is embodied in what is now Section 241(a)(1)(H) of the INA, 8 U.S.C. 1251(a)(1)(H), which provides that deportation "may, in the discretion of the Attorney General, be waived for any alien" who meets other specified requirements.[2] The Act itself

[2] Section 241(f) was repealed and replaced, so far as is relevant here, by Section 241(a)(1)(H) in 1990. Immigration Act of 1990, Pub. L. No. 101-649, Tit. VI, §§ 602(a) and (b)(1), 104 Stat. 5077, 5081.

provides no standards for, or limitations upon, the Attorney General's discretion in determining whether or not to waive deportation in a particular case. Under its language, she would be fully justified in considering (along with other positive and negative factors) the nature and gravity of the initial fraud or misrepresentation on entry that renders the alien deportable. See *Rodriguez-Barajas* v. *INS*, 992 F.2d 94, 97 (7th Cir. 1993); cf. *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956) (discussing exercise of discretion in granting suspension of deportation under 8 U.S.C. 1254).

The Attorney General, acting through the Board of Immigration Appeals (BIA), has to date adopted a more lenient policy. The BIA has concluded that, in weighing the factors for and against a waiver, the fraud or misrepresentation that renders the alien excludable "is the action for which [he] seek[s] to be forgiven" through the waiver, and therefore "should not [itself] be [weighed] as an adverse factor." *In re Alonzo*, 17 I. & N. Dec. 292, 294 (1979); see also *In re Da Silva*, 17 I. & N. Dec. 288, 290 (1979) ("While the initial fraud is obviously adverse, this is the action for which [the alien] seeks to be forgiven.")[3] The

[3] *Alonzo* and *Da Silva* were both exclusion cases, so that the waiver provision at issue was that set out in INA § 212(i), 8 U.S.C. 1182(i). See note 1, *supra*. Since 1981, when Congress made the parallel waiver-of-deportation provision in Section 241(f) (now Section 241(a)(1)(H)) discretionary, the BIA and the courts have generally held or assumed that the standards for discretionary relief under the two provisions should be the same. See, *e.g.*, *Delmundo* v. *INS*, 43 F.3d 436, 440 & n.4 (9th Cir. 1994). We make the same assumption for purposes of this petition.

Attorney General has not, however, chosen to extend that leniency to any fraud or misrepresentation occurring before or after the alien's initial entry. The BIA accordingly weighs such separate acts of dishonesty in the balance in determining whether or not a particular alien merits a discretionary waiver of deportation. See, *e.g.*, *Delmundo* v. *INS*, 43 F.3d 436 (9th Cir. 1994) (reversing BIA decision that relied on post-entry fraud).

The BIA followed that approach in this case, taking into account acts that both preceded and followed respondent's fraudulent entry. The Board found that respondent "engaged in a pattern of violating this country's immigration laws through fraud" by, among other things, (i) participating in his wife's fraudulent entry through a sham divorce and remarriage, (ii) entering the country fraudulently himself, (iii) applying for naturalization under false pretenses, and (iv) entering into another sham divorce in order to "rectify" his wife's initial fraud. App., *infra*, 10a. In accordance with the rule of *Alonzo* and *Da Silva*, the Board put to one side the fraud involved in respondent's own initial entry into the United States. *Ibid.* The Board weighed respondent's various other acts of fraud against him, however, in concluding that he did not merit a discretionary waiver of deportation. App., *infra*, 10a-11a. Neither the Board's procedure nor its conclusion remotely suggests any abuse of the broad discretion conferred on the Attorney General by Section 241(a)(1)(H).

2. The court of appeals nonetheless summarily reversed the Board's decision in this case. App., *infra*, 1a-4a. The court concluded that respondent's assistance in his wife's various frauds was "inextricably intertwined with [his] own efforts to secure entry

into the country," and that his own fraudulent application for citizenship was merely "an extension of [his] initial fraud." *Id.* at 2a-3a. Thus, although the court purported to apply the Board's own "initial fraud" rule, it substituted its own view for the Board's in determining how that rule should be interpreted and applied. In so doing, it relied in part on its prior decision in *Delmundo* v. *INS*, 43 F.3d 436 (9th Cir. 1994). Indeed, this case is one of a series of five recent decisions in which the court below has reversed BIA decisions denying discretionary relief from deportation under Section 241(a)(1)(H) or its predecessor, Section 241(f) (or under the parallel provision in Section 212(i) that is applicable to exclusion proceedings; see note 3, *supra*).

That series began with *Braun* v. *INS*, 992 F.2d 1016 (9th Cir. 1993). In *Braun*, the court of appeals noted the Board's practice of not considering the alien's initial-entry fraud as an adverse factor (*id.* at 1020-1021), and incorrectly suggested that that practice was required by the INA itself (*id.* at 1019-1020). The court then imposed its own view of how the initial fraud rule should be applied to the facts of that case. *Id.* at 1020-1021. Over the past two years, the court of appeals has followed *Braun* in *Casem* v. *INS*, 8 F.3d 700, 703 n.1 (majority opinion), 704 (Rymer, J., concurring) (1993); in *Delmundo*, *supra*; in this case; and in *Alquisalas* v. *INS*, 61 F.3d 722 (1995). In *Delmundo*, for example, the court held that any post-entry fraud undertaken to preserve the immigrant status obtained through an alien's initial fraud is immune from consideration, so that "misrepresentations made to obtain items necessary to live and work"—in that case, a driver's license, social security card, and voter identification card—"may not

be held against" the waiver applicant. *Delmundo*, 43 F.3d at 441. In this case, the court extended the same construction of the "initial fraud" rule to respondent's continuing course of serious immigration fraud—culminating in his fraudulent application for naturalization as a United States citizen, which the court held likewise "must be considered an extension of the initial fraud." App., *infra*, 2a-3a.[4]

As another panel of the Ninth Circuit has observed, the erroneous course of decisions that began with *Braun* has thus led the court of appeals to "substitute [its] discretion for that of the Attorney General" in evaluating requests for waivers under Section 241(a)(1)(H). *Alquisalas* v. *INS*, 61 F.3d at 724.[5]

[4] Both in this case and in *Delmundo*, the court of appeals remanded to the BIA for a reweighing of the equities, taking into account only the fact that in each case the alien apparently lied to the immigration judge in the course of the deportation proceedings under review. App., *infra*, 3a-4a; *Delmundo*, 43 F.3d at 442. The court did not explain why lying to an immigration judge may be counted against an alien in balancing the equities under the court's version of the "initial fraud" rule, whereas lying to the INS or to other governmental authorities (such as motor vehicle or Social Security officials) about the same matters may not be. Moreover, in this case, respondent could have obtained his 1985 divorce only by committing fraud on the court that entered the decree (*i.e.*, by misrepresenting his wife's identity and their marital history); yet the Ninth Circuit's decision would force the Attorney General to countenance that fraud, while allowing her to take account of respondent's "apparent lack of candor" (App., *infra*, 3a) before the immigration judge. There is no apparent reason for that distinction.

[5] *Alquisalas* involved an alien who originally entered the United States by fraudulently concealing the fact that he was married and the father of two children, subsequently went through a second marriage ceremony with his wife abroad, and ultimately divorced that wife and remarried a United States citizen. See 61 F.3d at 723, 724. The panel that decided *Alquisalas* made clear that, in its view, the Ninth Circuit's recent cases had inappropriately narrowed the scope of the Attorney General's discretion. *Id.* at 724-725. Nonetheless, the panel reversed the BIA's decision "[u]nder the compulsion of *Braun*," *Delmundo*, and the decision in this case. *Id.* at 725.

In its petition for rehearing and suggestion of rehearing en banc in this case, the INS relied (at 4-5) on those observations by the *Alquisalas* panel as a reason why the Ninth Circuit should grant en banc review and conform its precedent to the proper scope of judicial review of the Attorney General's discretionary waiver decisions. The full court nevertheless rejected our suggestion of rehearing en banc. Review by this Court is therefore the only remaining means for correcting the Ninth Circuit's expanding list of erroneous rulings in this area.

Indeed, the *Delmundo* court justified its result on the basis of a frank disagreement with the Board about how best to administer the Nation's immigration laws: "To follow the BIA's distinction between initial and subsequent instances of fraud would severely impair the effectiveness of relief statutes such as [INA] §§ 212(i) and 241(f)." 43 F.3d at 441. The INA commits decisions of that sort to the Attorney General, not to the courts. Compare, *e.g.*, *INS* v. *Rios-Pineda*, 471 U.S. 444, 451-452 (1985) ("[I]t is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review.").

3. The court of appeals' approach to reviewing the Attorney General's exercise of her discretion under Section 241(a)(1)(H) conflicts with that of other courts of appeals. In *Rodriguez-Barajas* v. *INS*, *supra*, the Seventh Circuit forcefully restated the fundamental rule of deference to any reasonable decision by the Attorney General:

> Discretion is not compulsion. The Attorney General has a choice to make, and courts review discretionary choices under the immigration laws with great deference. * * * [T]he Attorney General exercises a delegated power. What sort of standard to use (strict versus lenient) and how to apply it to individual aliens are in her hands. The judicial role lies in policing the boundaries of the statutory delegation and in assuring that discretion within the scope of that delegation is exercised in a reasoned way.

992 F.2d at 96. Indeed, the *Rodriguez-Barajas* court held squarely that the Attorney General is under no statutory compulsion to disregard the nature and severity of even an alien's initial fraud in considering whether or not to grant a waiver of deportation under Section 241(f) (now Section 241(a)(1)(H)). 992 F.2d at 97. *Rodriguez-Barajas* thus properly recognized that any restrictions the Attorney General may observe concerning what misconduct by the alien will be considered in making waiver determinations under Section 241(a)(1)(H) arise from her exercise of her own discretion, and not from any requirement of the Act. There is therefore little doubt that the BIA's entirely reasonable decision in this case would have been sustained had it been challenged in the Seventh Circuit, rather than in the court below.

Similarly, in *Liwanag* v. *INS*, 872 F.2d 685 (1989), reh'g denied, 878 F.2d 1435 (1989), the Fifth Circuit properly deferred to the BIA's conclusion that an alien's fraudulent acts in undertaking a second marriage to his wife, filing an immigrant visa petition on her behalf, and lying to an INS officer about their marriage were separate from his initial fraud, which

had involved a claim that he was not married made in order to secure his own initial entry into the United States. 872 F.2d at 687-688. The Fifth Circuit's decision in *Liwanag* conflicts directly on its facts with the Ninth Circuit's decision in this case that respondent's "participation in his wife's fraudulent entry into the country, including his taking part in sham divorces and remarriages[,] * * * [was] inextricably intertwined with [his] own efforts to secure entry into the country and must be considered part of the initial fraud." App., *infra*, 2a. More importantly, however, like *Rodriguez-Barajas*, the Fifth Circuit's holding in *Liwanag* conflicts in its central principle with the effective holdings by the Ninth Circuit in *Braun*, *Delmundo*, and the decision below that the court of appeals should review such questions de novo, rather than solely for abuse of the Attorney General's discretion. Cf. *Akindemowo* v. *INS*, 61 F.3d 282 (4th Cir. 1995) (emphasizing deference to the Attorney General's reasonable resolution of an analogous question concerning when separate crimes are part of a "single scheme of criminal misconduct" for purposes of INA § 241(a)(2)(A)(ii), 8 U.S.C. 1251(a)(2)(A)(ii)).

4. If allowed to stand, the Ninth Circuit's approach to review of discretionary waiver decisions under Section 241(a)(1)(H), and the conflict that that approach has created with the BIA and with other courts of appeals, will present a serious obstacle to the appropriate and even-handed implementation of the Attorney General's statutory waiver authority. The resulting disparity in applicable rules is unfair both to the INS, which must administer Section 241(a)(1)(H) throughout the country (see, *e.g.*, *Rios-Pineda*, 471 U.S. at 451), and to potentially eligi-

ble aliens, who are entitled to expect uniformity in the application of the waiver provision, regardless of the region in which their cases arise. Indeed, the lack of uniformity caused by the Ninth Circuit's decisions will prevent the Attorney General and her delegates from achieving precisely those goals that Congress identified when, at the INS's request, it provided for discretionary implementation of the waiver authority, rather than repealing it entirely: to "obviate the need for further litigation, and [to] promote the uniform administration of" the provision. H.R. Rep. No. 264, *supra*, at 25.

Even within the Ninth Circuit itself, application of the *Braun-Delmundo* rule will continue to produce anomalous results. For example, the rule places an alien who obtains his initial entry by fraud, and then commits a series of further fraudulent acts to preserve his illicit position, in a better position than an alien who enters the country properly, but later embarks on a similar series of fraudulent acts in an attempt to remain here. The former will, in the Ninth Circuit, have all of his frauds ignored in evaluating his request for a waiver of deportation under Section 241(a)(1)(H); the latter will have them all weighed in the balance against him if he seeks some other form of discretionary relief, such as that available under Section 212(c) of the Act, 8 U.S.C. 1182(c). That cannot be the result that Congress intended in providing for a limited, discretionary waiver of fraud in the initial entry itself.

The gravest anomaly caused by the Ninth Circuit's rule is illustrated by the facts of this case. As we have noted, the decision below requires the Attorney General to ignore, in balancing the equities relevant to respondent's request for a waiver of deportation,

the fact that he submitted a fraudulent petition for naturalization as a citizen of the United States. App., *infra*, 2a-3a. The court based that result on its conclusion that "applying for citizenship is similar in kind to the acts at issue in *Delmundo*" (*i.e.*, applying for a social security card, driver's license, and voter identification card), and that the fraudulent application therefore "must be considered an extension of [respondent's] initial fraud." *Id.* at 2a-3a. Yet, fraud in a naturalization application is normally a sufficient basis for *revocation of citizenship*, even if it is not discovered for many years. See 8 U.S.C. 1451; *Kungys* v. *United States*, 485 U.S. 759 (1988); *Fedorenko* v. *INS*, 449 U.S. 490 (1981). Congress did not intend for the Attorney General to ignore such fraud completely in deciding whether to waive the expulsion of an otherwise deportable alien.

It is, moreover, quite wrong to equate respondent's petition for naturalization as a citizen with the sort of acts at issue in *Delmundo*. Citizenship is a status distinct from and superior to permanent residence. Indeed, "[i]t would be difficult to exaggerate its value and importance." *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1942). Fraud in obtaining the greater benefit cannot properly be dismissed as a mere "extension" of earlier fraud in obtaining the lesser.[6]

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[6] Perhaps the most serious potential ramification of the decision below is the possibility that, if the Attorney General is precluded from considering respondent's pattern of post-entry fraud, including his fraudulent naturalization petition, for purposes of Section 241(a)(1)(H), she may also be precluded from considering it for purposes of acting on the naturalization petition itself. Under Section 310 of the INA, 8 U.S.C. 1421, the Attorney General has exclusive jurisdiction to grant peti-

The court of appeals' decision in this case thus requires the retention in this country of an individual whose entire relationship with the United States immigration system has been characterized by fraud, corruption, and deceit. In so doing, it improperly interferes with the Attorney General's exercise of her statutory discretion, and it conflicts in both approach and result with the decisions of two other courts of appeals. Taken together with other recent decisions from the same court of appeals, the court's decision moves a long way toward turning Section 241(a)(1)(H) into exactly what Congress sought to avoid in 1981, when it confided the decisions concerning waivers of this sort to the Attorney General's discretion: an engine of uncertainty and litigation, and in substance "a charter of amnesty, waiving all

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tions for naturalization. The BIA has previously decided, in another context, that a waiver of deportation under Section 241(a)(1)(H) also "waives the underlying fraud," effectively erasing the initial illegality and causing the recipient of the waiver to be treated as a lawful permanent resident from the time of entry. *In re Sosa-Hernandez*, BIA Interim Dec. No. 3214 (Nov. 12, 1993); see *In re Manchisi*, 12 I. & N. Dec. 132 (1967). We believe that the Attorney General should be able to conclude, in a case like respondent's, that an alien to whom she has been forced to grant a waiver of deportation under the Ninth Circuit's version of the "initial fraud" rule nonetheless has not displayed the "good moral character" required for naturalization as a citizen. 8 U.S.C. 1427(a); see also 8 U.S.C. 1427(d) and (e). It is, however, quite possible that a court—particularly the Ninth Circuit—would hold that such a waiver precludes consideration of the waived fraudulent acts for purposes of making any other determination under the INA. That concern is particularly serious because of recent increases in the number of naturalization petitions received by the Attorney General, which the INS informs us rose from 341,850 in fiscal year 1990 to 1,210,969 in fiscal year 1995.

restrictions for those who * * * entered the United States by fraud." H.R. Rep. No. 264, *supra*, at 25.

More broadly, the decision below typifies the course of recent Ninth Circuit decisions in which that court has substituted its judgment for that of the Attorney General on matters committed by Congress to her discretion. In the petition for a writ of certiorari in *INS* v. *Elramly* that we are filing simultaneously with the petition in this case, we seek review of another such decision by the same court. In that case, the Ninth Circuit held that the Attorney General, acting through the BIA, may not make a categorical judgment that aliens convicted of drug-trafficking offenses must show unusual or outstanding equities in order to merit a favorable exercise of discretion under Section 212(c) of the Act. *Elramly* v. *INS*, 49 F.3d 535 (1995). See also *Elramly* Pet. 14-15 (citing other recent Ninth Circuit decisions).

For all of the foregoing reasons, review by this Court is necessary in this case, both to restore to the Attorney General the discretion that Congress intended her to have in determining whether to grant relief from deportation under Section 241(a)(1)(H), and to restore in the Ninth Circuit the relationship between the Attorney General and reviewing courts that Congress intended to prevail in the administration of the Nation's immigration laws.

CONCLUSION

The petition for a writ certiorari should be granted.

Respectfully submitted.

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DECEMBER 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-70899
INS No. A36-413-841

YUEH-SHAIO YANG, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Petition to Review a Decision of the Immigration and Naturalization Service

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Argued and submitted April 3, 1995—
Pasadena, California

FILED JUNE 22, 1995

Before: MONROE G. MCKAY,* STEPHEN REINHARDT, AND FERDINAND F. FERNANDEZ, Circuit Judges.

OPINION

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* The Honorable Monroe G. McKay, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

McKAY, Circuit Judge:

Petitioner, Mr. Yang, claims that the Board of Immigration Appeals abused its discretion in refusing to grant him a discretionary waiver under Section 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C.A. § 1251(a)(1)(H) (West Supp. 1994). Mr. Yang concedes that he is deportable, but argues that the BIA improperly considered impermissible factors in denying the waiver.

The BIA considered several adverse factors in declining to grant the waiver. First, the BIA seems to have considered Mr. Yang's participation in his wife's fraudulent entry into the country, including his taking part in sham divorces and remarriages. These activities were clearly inextricably intertwined with Mr. Yang's own efforts to secure entry into the country and must be considered part of the initial fraud. Thus, the BIA improperly considered these acts as adverse factors.

The BIA also considered as an adverse factor the fact that Mr. Yang has submitted a fraudulent application for citizenship. The BIA apparently viewed this as a separate fraud from the initial series of frauds that allowed Mr. Yang to gain access to the country and become a lawful resident in the first place. However, in the recent case of *Delmundo v. INS*, 43 F.3d 436, 440-41 (9th Cir.1994), we held that the fraudulent acts committed in applying for permanent resident status and obtaining a driver's license, social security card, and voter's identification card were an extension of the initial fraudulent entry and could not be considered by the BIA in denying a discretionary waiver of excludability. We think that applying for citizenship is similar in kind to the acts

at issue in *Delmundo* and also must be considered an extension of the initial fraud. Thus, the BIA improperly considered this fraudulent act.

Finally, the BIA considered as an adverse factor Mr. Yang's "apparent lack of candor" before the immigration judge. A review of the initial decision by the immigration judge discloses that there were two components to this "apparent lack of candor." First, the immigration judge did not find Mr. and Mrs. Yang's testimony to be credible with respect to how they came to be in the country in the first place. Mr. Yang claimed to be an innocent and ignorant pawn rather than an active and knowing participant in a continuing plan involving false birth certificates, phony names, and sham divorces and remarriages. The immigration judge did not take all of the frauds themselves into account, but did take into account Mr. Yang's implausible continuing assertions that he was not involved in any intentional wrongdoing.

The other aspect of Mr. Yang's "apparent lack of candor" was his claim of indigency. Mr. Yang initially claimed to the court that he needed the economic support of his children here in the United States because of his poor financial situation. Upon further questioning, he eventually admitted to having very substantial assets, including "over $3 million in property and real estate and liquid assets in cash, stocks, etc. of $700,000." Being untruthful with the immigration court is an adverse factor which may be properly considered by the BIA. *Delmundo*, 43 F.3d at 443.

Because the BIA considered impermissible factors, namely, Mr. Yang's collaboration with his wife and his fraudulent application for citizenship, the decision of the BIA is vacated, and this matter is remanded for a reweighing of the equities, considering solely as an

adverse factor Mr. Yang's allegedly dishonest testimony before the immigration court.

VACATED AND REMANDED.

APPENDIX B

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A36 413 841 - Los Angeles
IN RE: YUEH SHAIO *YANG*
IN DEPORTATION PROCEEDINGS

ORAL ARGUMENT: JUNE 10, 1993

CHARGE:

Order: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)]—Excludable at time of entry under section 212(a)(14), I&N Act [8 U.S.C. § 1182(a)(14)] — No valid labor certification

Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)]—Excludable at time of entry under section 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

Lodged: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)]—Excludable at time of entry under section 212(a)(19), I&N Act [8 U.S.C. § 1182(a)(19)]—Sought to procure entry by fraud or willful misrepresentation of a material fact

APPLICATION: Waiver under section 241(a)(1)(h)

In a decision dated October 26, 1992, the immigration judge found the respondent deportable on the charges set forth above and denied his application for a waiver of deportability pursuant to section 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(H).[1] Oral argument was held before the Board on June 10, 1993. The appeal will be dismissed.

The respondent is a 73-year-old native and citizen of Taiwan. During the course of the deportation proceedings, the respondent conceded deportability based on the allegations against him as set forth above (Tr. at 4, 23). The only remaining issue at the hearing and on appeal is the respondent's eligibility for a waiver of deportability under section 241(a)(1)(H) of the Act.

The respondent was the beneficiary of an immediate relative visa petition filed by his wife. He entered the United States as a lawful permanent resident on August 1, 1978. However, the respondent was not entitled to lawful permanent resident status through his wife because his wife's claim to United States citizenship was fraudulent.

The respondent's wife first traveled to the United States in 1977 as a visitor (Tr. at 28-29). While there, she met an individual named Vincent who allegedly advised her that she could obtain United States citizenship if she were single and invested $60,000 in the United States. The respondent's wife returned to

[1] The respondent and his wife were both placed in deportation proceedings. Their cases were consolidated for presentation before the immigration judge. For reasons of clarity, the Board will issue separate decisions in these matters. However, they have been reviewed simultaneously.

Taiwan and, after explaining the situation to the respondent, obtained a divorce on the basis of incompatibility (Tr. at 31). She then returned to the United States with the $60,000. Upon payment of the $60,000 to Vincent, she received a birth certificate for a United States citizen woman with a name and birthdate other than her own. She also obtained a United States passport in her assumed name (Tr. at 35-38, 53).[2] The respondent's wife returned to Taiwan, where she and the respondent were remarried (Tr. at 38). The marriage certificate reflects that the respondent's wife used the name that she had obtained for immigration purposes (Exh. 6). The respondent's wife proceeded to file immediate relative petitions for the respondent and some of their children (Tr. at 38). The petitions were filed by the respondent's wife as a United States citizen in her assumed name.

The respondent and his wife settled in California, where the respondent invested approximately $2 million in his business, which involved real estate, as well as the purchase of a residence (Tr. at 77-78). In 1982, the respondent filed an application for naturalization with the Service (Tr. at 87; Exh. 8). The respondent stated in that application that his wife was a United States citizen by birth, and he provided the name and date of birth for his wife as these appeared on the birth certificate that she had used for immigration purposes. In 1984, the respondent's wife read a newspaper article on the subject of immigration fraud, which prompted her to attempt to undo her claim of citizenship based on a birth certificate other than her own (Tr. at 40). She therefore had her

[2] The respondent's wife testified that the last name on the birth certificate is the same as her maiden name (Tr. at 37).

daughter, who had obtained United States citizenship, file a petition in her behalf under her true identity (Tr. at 56). In 1985, she and the respondent again divorced (Tr. at 40; Exh. 6). The divorce decree refers to the respondent's wife by the name she acquired in 1978. Then, in 1992, they were remarried. In the 1992 marriage, the respondent's wife used her real name.

Throughout these proceedings, both the respondent and his wife claimed that they had believed in the propriety of their method of entering the United States until the respondent's wife was alerted to the wrongdoing by a newspaper article (Tr. at 67, 100-101). Neither the respondent nor his wife found it unusual that the respondent's wife would adopt a different name, present another's birth certificate in order to obtain immigration benefits, or be required to obtain a sham divorce (Tr. at 75). During the course of the hearing, the respondent was questioned about alleged acts of immigration fraud by his children. The respondent testified that he was not aware of these incidents until after the fact (Tr. at 82).

The respondent suffers from hypertension and submitted a corroborative letter from his doctor (Tr. at 90). Although the respondent testified that the downturn in the economy has adversely affected his business, he retains substantial assets in this country (Tr. at 84-85). The respondent and his wife have six children. One of the respondent's daughters lives in Taiwan with her husband and children (Tr. at 45, 61, 69). She has assisted the respondent and his wife financially (Tr. at 79). Two of the respondent's children travel between China and the United States for business (Tr. at 66, 70). The remaining three children reside in the United States. The respondent resided in Taiwan from 1945, when he arrived there

from mainland China, until 1978, when he emigrated to the United States (Tr. at 93).

The immigration judge determined that the respondent was statutorily eligible for relief pursuant to section 241(a)(1)(H) of the Act. However, the immigration judge concluded that the respondent did not merit the waiver in the exercise of discretion. The immigration judge found that, although the terms of the waiver operated to excuse the respondent's fraud at the time of entry, the respondent's perpetuation of the fraud after entry constituted an adverse factor. The immigration judge did not find the respondent's testimony regarding his lack of knowledge of the fraudulent nature of the circumstances under which his wife obtained her citizenship to be credible. On appeal, the respondent contends that the immigration judge incorrectly attributed the fraudulent actions of the respondent's wife and children to the respondent. The respondent also argues that the immigration judge both failed to consider and mischaracterized the evidence. Finally, the respondent claims that he merits favorable exercise of discretion.

Section 241(a)(1)(H) of the Act affords the Attorney General discretion to waive the deportation of an alien who is the spouse, parent, son, or daughter of a United States citizen, and who was in possession of an immigrant visa procured by fraud or misrepresentation at the time of entry. The alien bears the burden to prove his eligibility for a waiver of deportability under section 241(a)(1)(H), and that he merits such relief as a matter of discretion. *Matter of Fereira*, 14 I&N Dec. 509 (BIA 1973).

As found by the immigration judge, the respondent is statutorily eligible for the section 241(a)(1)(H) waiver, which may operate to excuse the initial fraud

of entering the United States with an immigrant visa obtained under the auspices of his wife's fraudulent claim to citizenship. This initial fraud was admitted by the respondent and concededly disregarded by the immigration judge in his evaluation of the merits of the respondent's application for discretionary relief.

As with other discretionary applications for a waiver of deportability, section 241(f)(1) of the Act necessitates a balancing of the alien's undesirability as a permanent resident with the social and humane considerations present to determine whether according him such relief is in the best interest of this country. *Cf., e.g., Matter of Marin*, 16 I&N Dec. 581 (BIA 1978) (section 212(c) relief). Adverse factors in the instant matter include the respondent's acts of immigration fraud before and after his 1978 entry into the United States and his apparent lack of candor during the deportation hearing regarding his knowledge of the significance of his fraud.

We find that the respondent has engaged in a pattern of violating this country's immigration laws through fraud. The respondent initially participated in his wife's scheme to enter the United States under an assumed identity by going through a sham divorce and remarriage. He then entered the country himself as the purported beneficiary of a United States citizen. He next applied for naturalization in 1982 and perpetuated the fraud of his wife's identity as a United States citizen. Finally, he entered into another sham divorce in order to attempt to rectify his wife's initial fraud and allow her to resume her true identity. Although the respondent's fraud in entering the United States in 1978 can be waived, his remaining acts involving fraud cannot. *See Start v. INS*, 803 F.2d 539 (9th Cir. 1986).

In his favor, the respondent has resided in this country for 15 years and has invested a substantial amount of money here, which has resulted in significant property and business ties. In addition, three of his children live in the United States. We conclude, however, as did the immigration judge, that the respondent does not merit relief in the exercise of discretion.

First, the respondent claims that he no longer takes an active part in his businesses. Second, while three of his children reside here on a permanent basis, his eldest daughter lives in Taiwan, two of his children appear to spend a large part of their time outside of the United States, and his wife has returned to Taiwan. Third, although the respondent suffers from hypertension, there is no evidence to suggest that his condition could not be treated effectively in Taiwan. Finally, although the respondent has lived in the United States for 15 years, he previously resided in Taiwan as an adult for more than 30 years.

Because we find that the serious nature of respondent's continuing course of immigration violations, both before and after his entry in 1978, outweighs the factors in his favor, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ James P. Morris
JAMES P. MORRIS
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Los Angeles, California

FILE NOS.: A 38 642 894
A 36 413 841

IN THE MATTER OF:

HAI-HSIA YANG, YUEH-SHAIO YANG,
RESPONDENTS

IN DEPORTATION PROCEEDINGS

[FILED: OCTOBER 26, 1992]

CHARGE: 241(a)(1)(A) as it relates to 212(a)(19) and 212(a)(20)—female respondent.
241(a)(1)(A) as it relates to 212(a)(14), (19), and (20)—male respondent.

APPLICATIONS: 241(a)(1)(H) of the Immigration and Nationality Act.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are a wife and husband, citizens of the Republic of China (Taiwan), natives of mainland China. The female respondent is 67 years old, and the male respondent, 72 years of age. The respondents were issued Orders to Show Cause by Government officials on January 28, 1992, charging them with being deportable under Sections 241(a)(1)(A) as it relates to 212(a)(19) and (20) in regard to the female respondent, and 241(a)(1)(A) as it relates to 212(a)(14), (19), and (20) as it relates to the male respondent.

These respondents first appeared before this Court at a hearing on March 19, 1992. At that time, the respondents, through their counsel, admitted to the allegations and charge of deportability originally contained on [*sic*] their Orders to Show Cause.

Subsequently, at the hearing on October 26, 1992, the Government withdrew the 241(a)(1)(B) charge of entry without inspection in allegation 5 on the original Order to Show Cause of the female respondent and, at that time, also lodged an additional charge of 241(a)(1)(A) as it relates to 212(a)(19) of the Act in relationship to the male applicant. The respondent, through counsel, admitted the additional lodged charge filed against the male applicant at the hearing on October 26, 1992.

Deportability, therefore, is not in issue in this case as the respondents, through their counsel have conceded the allegations and charges of deportability filed against them and presently active in this case.

The respondents sought relief from deportation in the form of a Section 241(a)(1)(H) waiver. That appli-

cation places the burden upon the respondents to prove that they meet both the statutory and discretionary eligibility factors that warrant a favorable exercise of discretion. The respondents must show that they are persons who are a spouse, parent, son, or daughter of a United States citizen. In this specific case, the respondents make that qualification and claim based upon relationship as parents to a naturalized U.S. citizen, one of their daughters, Lily Liu, also known as Qui-Li Yang.

The respondents also must present evidence and verify that they are in possession of immigrant visas or equivalent documents and are not [sic] otherwise admissable to the United States at the time of such entry, except for the grounds of 212(a)(14), (19), and (20), now known as Sections 212(a)(5)(A), 212(a)(6)(A), and 212(a)(7)(A).

The respondents, from the evidence and record presented, clearly are eligible to apply for the relief they are seeking. It is now the Court's responsibility to review the record to see whether they warrant as a matter of discretion that relief. The Court, in making this determination, notes that it does not take into account the original fraud perpetrated against the United States Government by the respondents; that is, the original fraud of the female respondent filing papers claiming to a United States citizen and obtaining a U.S. passport. Nor does the Court consider or take into account the male respondent's coming to this country and making claims falsely to be a spouse of a United States citizen. *See Liwanag v. INS*, 872 F.2d 685, 687 (5th Cir. 1989). However, as the Court stated in that case, a Section 241(f) waiver (now Section 241(a)(1)(H)) can be appropriately denied if an

alien continues in his fraud or in other subsequent acts from the original fraud or misrepresentation.

The Court reviews the following facts and evidence presented in this regard in determining whether that application for a waiver should be granted. First, the Court notes the equities of the respondents in this case. Residen[ce] as permanent residents for approximately 14 or so years, albeit a questionable or fraudulent status; five of their six children who are lawful permanent residents of this country and grandchildren, noted but unnamed and unnumbered.

The elder age of the two individuals, the female respondent being 67 years of age and the male respondent 72 years of age, both suffering from some age diseases of hypertension and worry due to these proceedings, as well as the down turn in economic situation in this country that has caused problems for the male respondent's construction and land business.

The respondent and Government counsel, however, describe the background of the original fraud to help the Court understand the basis of subsequent actions by the respondents. Briefly to describe the original frauds: the female respondent testified that a friend introduced her to an individual who indicated that for a sum of $60,000, that she could obtain United States citizenship or a visa to come to this country and remain here permanently. She and her husband were coming on business visas for periods of time but having to return to Taiwan upon expiration of these temporary stays. They both indicated they like the United States, the lifestyle here as well as the opportunities provided—a desire to remain in the United States.

The female respondent testified that she believed that she was applying for "investor status." At that

time, a requirement of approximately $40,000 was required to be filed and submitted for such qualification. Non-preference investor visas have been "unavailable" for over a decade, into the late '70's or early '80's.

Nevertheless, the respondent asserted that she was duped or misl[e]d, she asserts, by this individual, asserting that she nevertheless believed that the application she signed and sought was as an investor coming here as an alien seeking to add to the economy of this country. Instead, the record indicates, it appears that the respondent made claims to being a United States citizen, a person by the name of Mary Wong. Respondent nevertheless obtained a United States passport and subsequently came to this country. During the process of obtaining this document, a claim to citizenship, she divorced her husband, i.e., the respondent in this case, in Taiwan on December 29, 1977, ending at least formally and legally a marriage which had begun in December of 1940, when their marriage took place in mainland China.

She did all of this with the agreement of her husband, who was informed that for $60,000, an individual would assist his wife in coming to this country. It was, as they both admit, an intention to divorce for immigration purposes with full intent to remarry one another upon the respondent's, i.e., female respondent, obtaining legal status to come to this country.

The female respondent then filed papers obtaining her U.S. passport and documents to emigrate her husband, the other respondent in this case, and four of her six children. These four children, as well as her husband, emigrated to this country as spouse and

children of a U.S. citizen; i.e., the false claim of being a citizen by the name of Mary Wong. A fifth child had earlier come to the United States through her husband and relationships and, subsequently naturalized to become a U.S. citizen. One other child, the eldest daughter, at one point apparently was involved in fraudulent filings of her own and prosecuted criminally for those actions. Their only son also apparently was involved in attempting to fraudulently bring this sister, Nancy (the eldest daughter), into the United States by making false claim of marrying and being her husband. *See* these details and some explanations given in Exhibit 6, a memorandum from the U.S. Government. This investigation, in fact, caused the opening of an investigation which ultimately resulted in the two respondents being filed with actions before this Court.

The respondents' story continues where it indicates that further documents filed with the Immigration Service occurred in 1984, when the female respondent indicates because of some newspaper articles or indications of Chinese frauds being discovered, that she became worried that the documents she had obtained were also fraudulent. Instead of consulting an attorney on those legal matters or reporting their suspicions and fears to Government officials, they instead, as a family, decided to have the naturalized U.S. citizen daughter file an immediate relative petition as the mother or parent of a U.S. citizen (*see* Exhibit 7). The respondent[s] filed these documents, and the female respondent again was able to obtain further immigrant visas; i.e., immediate relative status of a permanent resident, after filing those appropriate documents with consular officials. Subsequently, the respondents again divorced one another

on February 13, 1985, in California but later again remarried on April 4, 1992, in Nevada.

The male respondent testified, indicating that he was involved deeply in business matters in Taiwan and did not have the time to emigrate or to take care of immigration matters at the time his wife originally came to the United States; i.e., the original fraud entry. He was told by her that for $60,000, that she could emigrate through an investment, it was asserted, and that he could then later come through her to the United States.

This respondent subsequently did so, after selling his profitable an ongoing businesses in Taiwan, and, as noted earlier, came to the United States as the spouse of a citizen. The respondent, when questioned by the Court, indicated that to him, at the time, $60,000 was of little consequence to him, so he made no inquiry as to the manner in which the money would be used, nor did he ever interview or speak with the individual making arrangements for his wife to come here, ostensibly as an investor and actually, as the record indicates, as a claimed false U.S. citizen.

The respondent, however, did finally come to this country and carried on a construction and building business in the Southern California area. His present business is dormant because of the poor economic conditions in building and buying conditions of homes and other buildings. He did, however, testify that his land holdings include three undeveloped or partially developed properties in downtown Chinatown in Los Angeles, El Hambro, and Pasadena, as well as a residence in the San Marino area. The value he put at these four properties range to a total value of $3,350,000, not discounting, however, mortgages owed—that is the gross value.

The respondent also has two businesses in the United States (*see* Exhibit 6, sub-exhibit M and N). One business, he states, is, in effect, in paper only. The other business, Landmark Enterprises, is not, at this time, investing but has in its equity or balance sheet approximately $700,000 in liquid cash or other valuables.

The documents filed also by the Government disclose a filing by the male respondent of an N-400 application, or petition for naturalization (*see* Exhibit 8).

The last testimony and evidence provided by the respondent was from their naturalized U.S. citizen daughter, Lily Liu. She testified that she became a permanent resident through an in-law filing for her and her husband, coming to this country in the late 1970's. She ultimately became a naturalized U.S. citizen, one who, as noted earlier, filed a permanent resident immediate relative visa petition for the mother in 1984.

She testified that the family in the United States lived together in the same home in San Marino, although there is apparently three generations living together. This, however, is not an abnormal situation in Chinese families.

She testified that due to the business downturn of her father's businesses, that a sister in China, identified as "Mimi," also known officially as Cecelia, is the one who supports the respondents, according to their daughter and witnesses, from Taiwan.

The Government's argument is that the respondents, although eligible for the waiver, should be denied that application as a matter of discretion due to the continuing fraud and subsequent frauds perpetrated by the respondents and members of their

family since coming to the United States on the original fraud.

The Court notes the difficulties and desires of many individuals to come to the United States, for its opportunities, freedoms, and benefits; that many individuals will sometimes take the shortcuts to obtain residence in the United States.

The respondents in this case are clearly those who have sought such shortcuts in order to come to this country and now seek the Court to waive or relieve them of their prior actions.

The Court is sympathetic and understands the respondents desires when they came to this country but also notes that the respondents also, although committing original acts of fraud, have gone further subsequently to protect, perpetuate, and add to these fraudulent actions and filings, often with the acquiescence and actual knowledge of their children.

The Court notes in the female respondent's case that even in Court today, she equivocated in regard to her actions and the frauds perpetrated against the United States and the immigration laws of this country. She asserts that she was, in effect, an individual also duped by a con artist, who allegedly informed her that she was seeking an investor status but, to her surprise, actually had filed a fraudulent claim for her to make application to be a U.S. citizen. The Court notes, however, instead of coming clean and seeking Government assistance, she instead chose to continue with additional fraudulent actions by having a daughter file a visa petition on her behalf (*see* documents, Exhibit 7). The Court finds it difficult to believe that even though the female respondent is of limited formal education, that she did not realize the actions in

obtaining her documents and subsequently obtaining other immigration documents.

The Court, in making this finding, does not take into effect the original fraud or its actions but notes that the Court believes that the respondent has not been fully candid, if not continue[d] to lie to the Court in regard to her actions and prior applications to come to this country. The Court does not find credible her assertions that she was the duped individual in her original application to come to this country as a fraudulent U.S. citizen. It is difficult for the Court to believe that an individual would not have some suspicion that the documents filed for her were of questionable nature when requiring that she divorce her husband to come to this country, that a name change would have to be done for her to come to this country as an investor, that a United States passport would be issued to someone who is merely a[n] "investor" from another country. And, lastly, the Court notes the fact that in all intents, the respondent and her husband, i.e., the other respondent in this case, intended to remarry once she legalized her status here. That alone is indications of the divorce and actions for immigration purposes unlawful in and of itself. [*Sic.*]

The respondent, however, continued in this fraud by filing visa petitions on behalf of her husband and four children to come to this country, further making misrepresentations in those applications.

As noted subsequently, she asserts she worried about her original entry in 1984 and had her naturalized U.S. citizen daughter file additional papers for her to come as the immediate relative of a United States citizen. All these documents confirm to the Court's view that the respondents knowingly, fraudu-

lently entered into making applications for entry into this country that went *beyond* the original fraud. Exhibit 7, the application for immigrant visa and alien registration form, filed on the female respondent's behalf by a U.S. citizen child, indicates a number of obvious discrepancies that would have indicated to any intelligent individual, educated or not, that this document was of questionable and fraudulent nature. Item 2 indicates in Chinese and English that all listed names or other names used must be listed. The respondent never submitted or indicated that she had ever used the name "Mary Wong." Although truthfully, in Item 4, telling her true birth date of July 17, 1925, the respondent, as stated earlier, had no question in her original fraud about putting a different date of birth to her original application when she came here, further indicates of questionable conduct and actions.

Item 9 further indicates, in the Court's view, that the respondent filed these papers with fraudulent and knowing intent. The marital status indicating that including her present marriage, she had only been married on one occasion[]. The respondent, as the Court notes, was married not only in December of 1940 but had intentions to remarry again as soon as papers were sufficiently settled and completed. She did this approximately 3 months later in February of 1985. The respondent was, in effect, married to her husband on three separate occasions: in 1940, 1978, and 1992. Clearly at the time of filing of the application for immigrant visa in 1984, she had been married to her same husband on at least two occasions. This, however, was not disclosed. Lastly, in Item 31 of that visa, she disclosed two entries as B-2 visitors but failed to disclose her entries as a

claimed U.S. citizen on many other occasions after obtaining that original visa as an [sic] claimed U.S. citizen.

The respondent's daughter, the naturalized citizen, further assisted in perpetuating this fraud. Her I-130 visa petition accompanying on behalf of her mother also failed to disclose other names used by the female respondent or beneficiary. There was a claimed divorce from her father although, prior to that, a remarriage had occurred. *See* Item 3 of Form I-130. Item 5 also indicates that the beneficiary was allegedly never in the United States prior to making that application.

In the male respondent's case, he continued with his fraudulent application and actions by filing an N-400 application with the Immigration and Naturalization Service on or about August 17, 1982. These documents continue to perpetrate a continual fraud. Item 33 indicating that the respondent claimed to be married to a U.S. citizen by the name of "Mary," the marriage occurring on May 17, 1978, the second marriage to his wife, who had used the fraudulent identity. This claim was also added to by the fact that he agreed and protected the fraud and attempting to claim to seek that benefit; i.e., U.S. citizenship, by claiming his wife was born in San Francisco, California, February 15, 1931.

This respondent also was not, the Court believes, candid in all of his testimony and presentations to the Court, claiming indigency or a poor economic state and situation, needing the support of their family, i.e., children or daughters, to take care of them in this country because of the downturn and losses in his business. It was only after the Court was persistent in questioning the respondent that he conceded that

his assets were of substantia[l] and liquid nature, contrary to the testimony of the respondent's spouse as well as the male respondent's earlier testimony. Finally, disclosing assets in the form of over $3 million in property and real estate and liquid assets in cash, stocks, etc., of $700,000.

The Court further notes that the respondents, even when they [are] required to leave this country, are not returning to a country unfamiliar to them or unknown to them. It is a country where they have lived most of their lives, where they understand the culture and the language. The respondents also have two daughters apparently living in that country. Both of them apparently well-to-do in business, and one with in-laws of substantial economic power and wealth.

The Court lastly notes that the equities the respondents based their waiver on are also solely in relationship to children who obtained their benefits through the original fraud and, themselves, having committed actions of less than sterling nature. One child, their son, involved in fraud himself, attempting to bring his older sister to the United States by fraudulently marrying her and claiming a lawful and legal marriage. This daughter herself indicted and criminally convicted for immigration law violations. Their U.S. citizen naturalized daughter was involved in the fraudulent filing of the I-130 Exhibit 7 visa petitions for the female respondent.

None of these equities add to the respondents seeking of the relief but only convinces the Court that the respondents have continued, even to this day, to be equivocating and not fully truthful to the Court in seeking this relief, that they even, after the original frauds, continued to commit additional frauds

in seeking of additional benefits under the Immigration and Nationality Act.

The Court therefore finds as a matter of discretion that the respondents do not warrant the relief they are seeking, failing to show substantial equities that would convince the Court that they should remain in the United States as permanent residents. The respondents are not destitute, although old and in some medical difficulty. They nevertheless are wealthy individuals with family in their own country where they could return to and have a good and fruitful life. The family of the respondents, i.e, their children, are also in questionable status at this point, although other marriages and relationships in this country may be able to later cure their problems.

The Court therefore finds from the evidence presented that the respondents applications for relief should be denied.

ORDER

IT IS ORDERED that the respondents' applications for Section 241(a)(1)(H) relief be denied.

IT IS FURTHER ORDERED that the respondents be deported from the United States to the countries of birth and/or citizenship, the Republic of China, Taiwan.

/s/ Thomas Y. K. Fong
THOMAS Y. K. FONG
Immigration Judge

APPENDIX D

Not For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-70899
INS No. A36-413-841
[39-12C-3159]

YUEH-SHAIO YANG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[FILED OCT. 5, 1995]

ORDER

Before: MCKAY,* REINHARDT, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Monroe G. McKay, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

APPENDIX E

1. Section 241(f)(1) of the INA, 8 U.S.C. 1251(f)(1) (1988), as amended by the Act of Dec. 29, 1981, Pub. L. 97-116, § 8, 95 Stat. 1616, and repealed by the Act of Nov. 29, 1990, Pub. L. No. 101-649, Tit. 6, § 602(b)(1), 104 Stat. 5081, provided as follows:

§ 1251. Deportable Aliens

(f) Discretion of Attorney General to waive deportation for fraudulent entry in specified cases

(1)(A) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in subsection (a)(19) of this section [relating to persons involved in Nazi persecution]) who—

(i) is the spouse, parent, or child of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (14), (20), and (21) of section 1182(a) of this title [relating to labor certifications, immigrant visas, and visa allocation provisions] which

were a direct result of that fraud or misrepresentation.

(B) A waiver of deportation for fraud or misrepresentation granted under subparagraph (A) shall also operate to waive deportation based on the grounds of inadmissibility at entry described under subparagraph (A)(ii) directly resulting from such fraud or misrepresentation.

2. Section 241(f) of the INA, 8 U.S.C. 1251(f) (1964), as added by the Act of Sept. 26, 1961, Pub. L. 87-301, § 16, 75 Stat. 655, provided as follows:

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

3. Section 212(a) of the INA, 8 U.S.C. 1182(a) (1988), provided in pertinent part as follows before its amendment by the Act of Nov. 29, 1990, Pub. L. No. 101-649, Tit. 6, § 601(a), 104 Stat. 5075:

§ 1182. Excludable aliens

(a) General classes

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title;

* * * * *

(19) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure or has procured, a visa, other documentation, or entry into the United States or other benefit provided under this chapter;

* * * * *

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a

valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title[.]

* * * * *

(i) Admission for permanent residence of alien spouse, parent, or child excludable for fraud, misrepresentation, or perjury

Any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, or other benefit under this chapter by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, may be granted a visa and admitted to the United States for permanent residence, if otherwise admissable, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States.

Supreme Court, U.S.
FILED
JAN 18 1996
CLERK

No. 95-938

In The

Supreme Court of the United States

October Term, 1995

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

YUEH-SHAIO YANG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a denial of a waiver of deportation impermissibly relied upon facts that were part of the initial ground of deportation which is sought to be waived.

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STATEMENT OF THE CASE

The Respondent, Mr. Yueh-Shaio Yang, immigrated to the United States in 1982, based upon the petition of his wife, Mary Wong, who claimed to be a United States citizen by birth at San Francisco, California on January 4, 1931. (*See* Appendix A to the Petition for Writ of Certiorari, hereinafter, "Pet. App.", at 6a, 16a, 23a). Mr. Yang subsequently applied for naturalization. On his application he answered a question regarding his marital status by stating that his wife's name was Mary and that she was born in San Francisco in 1931. Pet. App. at 23a. When it was discovered that his wife was not a citizen, the Immigration and Naturalization Service instituted deportation proceedings against Mr. Yang charging that he had procured his immigration by fraud. Mr. Yang admitted the allegation and applied for a waiver of deportation under § 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(H), based upon family unity principles. The immigration judge denied the application in the exercise of his discretion. The Board of Immigration Appeals upheld the denial. The Ninth Circuit Court of Appeals reversed holding that the agency had improperly relied upon facts which were part of the initial entry fraud which was being waived.

Mr. Yang is a 73 year old national of the Republic of China on Taiwan. He and his wife, who is a also a Chinese national, were first married in China. They divorced in 1977. She then came to the United States on a visitor's visa, assumed the identity of Mary Wong, obtained a California birth certificate and United States passport. She then returned to Taiwan and remarried her husband using her new identity. She petitioned for Mr. Yang's immigration which was approved. Pet. App. at 6a-7a. Subsequently, Mr. Yang applied for naturalization. On the application for naturalization is a question regarding name, date and place of birth of spouse. Mr. Yang continued the deception

from his initial entry by listing the same information that his wife used to immigrate him in the first place. Pet. App. at 7a. Although Mr. Yang wrote that the first name of his wife was Mary, the record is not clear whether she routinely used the American name of Mary. What is clear and undisputed is that she was not born in San Francisco in 1931. The Immigration and Naturalization Service contends that it is proper for the immigration judge and the Board of Immigration Appeals to consider the naturalization application in balancing the equities as to whether or not to grant the deportation waiver.

The parties are in agreement that the case law is clear that the initial fraud should not be evaluated in considering the waiver of that fraud. The issue is whether the misrepresentations in the application for naturalization are part of and merely an extension of the initial entry fraud such that they may not be considered.

The opinion of the court of appeals concisely sets forth the two areas that the Board of Immigration Appeals (hereinafter, "BIA") impermissibly considered in deciding the waiver. The court found that the naturalization application was merely an extension of the initial fraud and therefore could not be held against Mr. Yang. In addition to the naturalization application, the BIA also considered Mr. Yang's participation in divorcing and then remarrying his wife. The court of appeals properly ruled that the act of divorcing and remarrying were inextricably tied into securing his own entry into the United States and therefore should not be considered. In order to immigrate, Mr. Yang needed to "marry" his wife a second time under her new United States identity. However, all his other records showed that he was already married. He had to divorce Mrs. Yang in order to be free to marry "Mary". But for the divorce, Mr. Yang could not have benefited from his wife's newly acquired United States passport. Clearly, the divorce and remarriage are inextricably intertwined with Mr. Yang's coming to this country. (Mr. Yang

and "Mary" subsequently divorced, but no immigration benefits flowed from the second divorce).

The INS argues in this petition that the opinion below is one in a series of five decisions where the court of appeals has erroneously substituted its own discretion for that of the BIA. In the first of the series, *Braun v. INS*, 992 F.2d 1016 (9th Cir. 1993), the alien immigrated based upon a marriage to a U.S. citizen. Braun subsequently divorced the citizen wife, and married a second time to a foreign national. When he applied for naturalization, it was discovered that his "second" wife was in fact a wife from an even earlier, undissolved marriage which predated his marriage to the citizen wife. The INS in that case contended that Braun had engaged in an "elaborate plan" to bring his original wife to the United States. The court of appeal noted that the record did not contain any evidence to substantiate that contention. The record did not reflect that Braun filed any immigration petition on behalf of the original wife. In the second case, *Casem v. INS*, 8 F.3d 700 (9th Cir. 1993), the alien immigrated as the unmarried daughter of a permanent resident. After immigrating, she returned to the home country, married and filed an immigration petition for her husband. During the adjudication of that immigration petition, it was discovered that she had been married to him prior to her own immigration and had concealed that marriage to maintain eligibility to immigrate as an unmarried daughter. When confronted with the true facts she withdrew the petition for her husband. The court of appeal held that the waiver of deportation should have been granted upon a consideration of all the relevant factors. In the fourth case, *Delmundo v. INS*, 43 F.3d 436 (9th Cir. 1994), the alien entered the United States as a nonimmigrant visitor using a false identity. She married a United States citizen under this assumed identity and basically lived a new life under the assumed name—obtaining a driver's license, social security card, and voter's identification card. When she applied for naturalization, she

continued to identify herself under the assumed name. She was discovered and deportation proceedings were commenced. She applied for a new grant of permanent residence based upon her marriage to a United States citizen and applied for a waiver of the initial fraud under § 212(i), 8 U.S.C. § 1182(i) which is the initial immigration application waiver analogous to the deportation waiver of § 241(a)(1)(H) in this case. The court held that the waiver should have been granted because her actions in obtaining the identification documents were to maintain and continue her new identity and were not separate and distinct acts of fraud.

The fourth case is the instant case in the petition pending before the Court. In the fifth case, *Alquisalas v. INS*, 61 F.3d 722 (9th Cir. 1995), the alien also entered as the unmarried child of a permanent resident. In fact, Alquisalas had married prior to immigrating. A year after immigrating, he returned to the home country and married his wife a second time. As the opinion notes, the administrative record did not show that Alquisalas tried to petition for his wife to come to the United States and that she was still residing overseas when the deportation proceedings commenced. Nevertheless, the INS contended that Alquisalas' remarriage to his original wife constituted an adverse factor to allow the wife to immigrate to the United States. The court of appeals held that the remarriage, without more, cannot be considered to be fraud. In the *Braun*, *Delmundo*, and *Alquisalas* cases, no further immigration benefits to any other persons were derived from the initial fraudulent entry. Only in the *Casem* case did the alien attempt to use her fraudulent immigration to petition for another person. In the petition before the Court, there is no evidence in the administrative record to show that Mr. Yang tried to use his immigration status to petition for anyone else's permanent residence. In the *Braun* and *Alquisalas* cases, one could conceivably argue that the remarriages were in preparation for some future immigration petition to the spouse. In this case, Mr. Yang did not apply for anyone else and would have no reason

to do so. As the decision of the immigration judge notes, after Mr. Yang's wife obtained her United States passport, she petitioned for Mr. Yang and their children. The evidence does not show that he tried to petition for them. Pet. App. at 7a. And, after his wife's assumed identity was exposed, their United States citizen daughter petitioned for the mother's immigration legitimately. Pet. App. at 7a -8a.

The INS cites *Liwanag v. INS*, 872 F.2d 685, *reh'g denied*, 878 F.2d 1435 (5th Cir. 1989), as the proper decision to follow. However, that case is clearly distinguishable from Mr. Yang's situation. In the *Liwanag* case, as in the *Casem* case, the alien remarried his wife and filed an immigration petition on her behalf.

Mr. Yang's continued assertions on his naturalization application that his wife was born at San Francisco is nothing more than a part of a single scheme to continue to maintain his wife's assumed identity. The court's opinion below is consistent with the INS' own decisions of many years not to consider acts which are a part of the initial fraud. *See Matter of Alonzo*, 17 I. & N. Dec. 292 (1979); *Matter of Da Silva*, 17 I. & N. Dec. 288 (1979).

There are no compelling reasons to grant this petition for a writ of certiorari. Whatever immigration benefits aliens such as those in *Braun* and *Alquisalas* may confer on their respective spouses is speculative and irrelevant to Mr. Yang's case. It would be unfair and impose a serious practical burden on Mr. Yang to require him to defend a line of cases which is clearly distinguishable from the decision in his case.

CONCLUSION

The opinion of the Court of Appeals is correct and this Court should deny the writ for the reasons as stated above.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 95-938

In the Supreme Court of the United States

OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

Respondent offers no answer to our analysis (Pet. 10-13) of the text and history of 8 U.S.C. 1251(a)(1)(H). Nor does he challenge our submission (Pet. 12-13) that Congress intended that provision to confer broad discretion on the Attorney General, and to enable her to establish uniform standards for waivers of deportation for resident aliens who committed fraud in connection with their initial entry into the United States. Indeed, respondent does not even mention the Seventh Circuit's decision in *Rodriguez-Barajas* v. *INS*, 992 F.2d 94 (1993), which confirmed the breadth of the Attorney General's discretion under Section 1251(a)(1)(H) and the narrow role of the courts in reviewing its exercise, and which conflicts directly

with the Ninth Circuit's decisions in this and similar cases. See Pet. 17-18. Instead, respondent suggests only two narrow grounds for denying review in this case. Neither of respondent's arguments is persuasive.

1. Respondent defends (Br. in Opp. 2-3) the court of appeals' determination that all his acts of immigration fraud were "inextricably tied into securing his own entry into the United States" (*id.* at 2). On that basis, he maintains (*id.* at 5) that the court was justified in forbidding the Attorney General to consider any of those acts in deciding whether or not to waive his deportation. As the petition points out (at 17), however, Congress has committed decisions concerning whether and how to distinguish "prior" or "subsequent" acts of immigration fraud from those committed directly in connection with an alien's initial entry, like the decision whether or not to take the initial-entry fraud itself into account in considering waiver applications, to "the discretion of the Attorney General." 8 U.S.C. 1251(a)(1)(H). The role of a reviewing court is not to make such judgments de novo, but merely to "polic[e] the boundaries of the statutory delegation" of discretion to the Attorney General. *Rodriguez-Barajas*, 992 F.2d at 96. In reviewing the Board of Immigration Appeals' reasonable exercise of that discretion in this and a number of similar cases, the Ninth Circuit has substantially overstepped the proper limits of its own role. In so doing, it has placed itself in conflict with decisions of two other courts of appeals—*Rodriguez-Barajas*, *supra*, and *Liwanag* v. *INS*, 872 F.2d 685 (5th Cir. 1989). See Pet. 17-19. This Court's review is necessary to eliminate that circuit conflict, and to halt the continuing pattern of Ninth Circuit decisions

that have improperly restricted the scope of the discretionary authority conferred upon the Attorney General by the Immigration and Nationality Act. See Pet. 22-23.

2. Respondent restates (Br. in Opp. 3-4) the facts of the related Ninth Circuit decisions identified by the petition, and he argues that the immigration fraud at issue in his case is not particularly serious because "there is no evidence in the administrative record to show that [respondent] tried to use his immigration status to petition for anyone else's permanent residence" (*id.* at 4). Respondent's conduct was, to the contrary, bound up from the beginning with the fraudulent entry of other members of his family.* In any event, respondent's attempt to distinguish his case from some others in the same line of authority, and from the conflicting decision in *Liwanag* (see Br. in Opp. 5), on that basis is irrelevant to our argument that the Ninth Circuit has made the same fundamental error in each case: substituting its own discretion for that of the Attorney General. Compare *Liwanag*, 872 F.2d at 688. Moreover, the Ninth

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* The Board of Immigration Appeals took into account, among other fraudulent acts, respondent's participation in two sham divorces designed first to help his wife to gain her own entry into the United States, and then to help her conceal her original fraud and to resume her true identity, once she had discovered other means to maintain her status as a permanent resident. See Pet. 5-6, 8; Pet. App. 10a. It is also disingenuous, on the facts of this case, for respondent to attempt (Br. in Opp. 5) to dissociate himself from his wife's petitions for resident status for their children (which were based, like her petition on behalf of respondent himself, on the fraudulent claim to U.S. citizenship that respondent had helped her to establish). See Pet. 5-6.

Circuit, in its most recent decision in this line (issued after we filed our certiorari petition), has specifically rejected the distinction that petitioner suggests. See *Lising* v. *INS*, No. 94-70445 (Dec. 27, 1995), slip op. 15846 ("Although one of petitioner's subsequent fraudulent acts was committed in order to obtain entry for his family, we find no basis for distinguishing this case from *Yang* and *Delmundo* [v. *INS*, 43 F.3d 436 (9th Cir. 1994).]. Indeed, the reasoning of those cases requires us to find them controlling here."). That purported distinction therefore provides no basis for this Court to deny review.

* * * * *

For the foregoing reasons, and for those stated in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

JANUARY 1996

Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

(5)

No. 95-938

In the Supreme Court of the United States

OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Suite 775
Los Angeles, CA 90010
(213) 387-0954

Counsel of Record
for Respondent

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Solicitor General
Department of Justice
Washington, D.C. 20530
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PETITION FOR A WRIT OF CERTIORARI FILED: DECEMBER 13, 1995
CERTIORARI GRANTED: FEBRUARY 20, 1996

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Order Allowing Certiorari (February 20, 1996)	13

The following documents have been omitted in printing this Joint Appendix, pursuant to Sup. Ct. R. 26.1, because they appear on the cited pages in the Appendix to the Petition for a Writ of Certiorari:

Appendix A:	Opinion of the Court of Appeals (June 22, 1995)	1a-4a
Appendix B:	Decision of the Board of Immigration Appeals, U.S. Department of Justice (June 10, 1993)	5a-11a
Appendix C:	Oral Decision of the Office of the Immigration Judge (October 26, 1992)	12a-25a

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

File No. A36 413 841

UNITED STATES OF AMERICA:

In the Matter of Mr. Yueh Shaio YANG
816 Chester Avenue
San Marino, CA 91108

Address (number, street, city, state and ZIP code)

Respondent.

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of China
   and a citizen of Republic of China.
3. You entered the United States at Los Angeles, California on or about August 1, 1978;

(SEE ATTACHED COPY AND MADE A PART HEREOF)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

(SEE ATTACHED COPY AND MADE A PART HEREOF)

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at A PLACE AND DATE TO BE SET on _____at _____m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: January 6, 1992

/s/ JOHN BRUSTEAD
JOHN BRUSTEAD
(signature and title of issuing officer)
ASSISTANT DISTRICT DIRECTOR,
INVESTIGATIONS
LOS ANGELES, CALIFORNIA
(City and State)

EXHIBIT No 1
MAR 19 1992
(DATE) (INITIALS)
de

Form 1-221 (Rev. 7-1-73) (over)

[0335]

Mr. Yueh-Shaio YANG

January 6, 1992

FACTUAL ALLEGATIONS

4. You were then admitted as an immediate relative immigrant upon presentation of an immigrant visa issued to you as a spouse of a citizen of the United States by a United States Consulate official at Taipei Taiwan, Republic of China on May 24, 1978, pursuant to an application for such visa execution by you under oath, before that official;
5. In support of the application you submitted a marriage certificate reflecting that you married Mary Wong at Taipei Taiwan China and a birth certificate reflecting the birth of Mary Wong on February 25, 1931, at San Francisco, California;
6. On November 11, 1958, the afore mentioned Mary Wong, a United States Citizen, died at San Francisco, California;
7. At the time of your admission to the United States as an immigrant you were not the immediate relative of a citizen of the United States;
8. You entered the United States for the purpose of performing skilled or unskilled labor in the United States;
9. At the time of your application for an immigrant visa and at the time of your admission to the United States you did not possess or present a Labor Certificate issued by a representative of the Secretary of Labor.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(1)(A) of the Immigration and Nationality Act, as amended, in that at the time of entry or adjustment of status you were within one

or more of aliens excludable by the law existing at the time of entry, to wit: aliens who are seeking to enter for the purpose of performing skilled or unskilled labor and in whose cases the Secretary of Labor has not made the certification as provided by Section 212(a)(14) of the Act.

Section 241(a)(1)(A) of the Immigration and Nationality Act, as amended, in that at the time of entry or adjustment of status you were within one or more classes of aliens excludable by the law existing at the time of entry, to wit: aliens who are immigrants not in possession of a valid, unexpired immigrant visa, re-entry permit, border crossing identification card, or other valid entry document and not exempted from the possession thereof by said act or regulations made thereunder, under Section 212(a)(20) of the Act.

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation, including the privilege of departing voluntarily, for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

_____
(signature of respondent)

Before:

_____
(signature and title of witnessing officer) (date)

CERTIFICATE OF SERVICE

This order and notice were served by me on 1-29-92 in the following manner: (date)

/s/ [illegible]
(signature and title of employee or officer)

[0336]

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

ADDITIONAL CHARGES OF DEPORTABILITY

FILE NO. A36 413 841

UNITED STATES OF AMERICA
IN THE MATTER OF YANG, Yueh Shaio, Respondent.

IN DEPORTATION PROCEEDINGS UNDER SECTION 242 OF THE IMMIGRATION AND NATIONALITY ACT
[Spanish Translation Omitted]

TO: (A) YANG, Yueh Shaio
There is hereby lodged against you the additional charges(s) that you are subject to be taken into custody and deported pursuant to the following provision(s) of law: (Spanish Translation Omitted)

Section 241(a)(1)(A) of the Immigration & Nationality Act, as amended, in that at the time of entry or adjustment of status you were within one or more or the classes of aliens excludable by the law existing at such time, to wit, aliens who have procured a visa or other documentation by fraud or by willfully misrepresenting a material fact, under Section 212(a)(19) of the Act.

In support of the additional charge(s) there is submitted the following factual allegation(s) in addition to those set forth in the order of show cause and notice of hearing: (Spanish Translation Omitted)

EXHIBIT No. 1-A
OCT 26 1992
(DATE) (INITIALS)

10-26-92 /s/ WILLIAM KIANG
Date WILLIAM KIANG
Trial Attorney

[0326]

ADDITIONAL ALLEGATIONS-CONTINUED
(Spanish Translation Omitted)

NOTICE OF RIGHTS
(Spanish Translation Omitted)

You may be represented, at no expense to the United States government, by an attorney or other individual who is authorized and qualified to represent persons in these proceedings. You may also be represented by a friend, relative, or other person having a pre-existing relationship with you, provided his or her appearance is permitted by the immigration judge.

You will have a hearing before an immigration judge, scheduled no sooner than 14 days from the date you are served with the Order to Show Cause. (Unless you request in writing an earlier hearing date.) The 14 day period is allow you to seek an attorney or representative, if you desire to be represented.
[Spanish Translation Omitted]

CERTIFICATE OF SERVICE

This form was served by me at _____ on _____, 19____

by [ ] Personal Service
[ ] Certified Mail - Return Receipt Requested
[ ] Alien
[ ] Counsel of Record

to:_____
Address

_____
Signature of Issuing Person

_____
Alien's Signature (acknowledgement / receipt of this form)

[0327]

Form 1-261 8/18/92

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

OMB NO. 1115-0009
Approval Expires 1/31/84

APPLICATION TO FILE PETITION FOR NATURALIZATION

FEE STAMP 77786

Mail or take to:
IMMIGRATION AND NATURALIZATION SERVICE

(See INSTRUCTIONS. BE SURE YOU UNDERSTAND EACH QUESTION BEFORE YOU ANSWER IT. PLEASE PRINT OR TYPE.)

ALIEN REGISTRATION
(Show the exact spelling of your name as it appears on your alien registration receipt card, and the number of your card. If you did not register, so state.)
Name YANG, YUEH-SHIAO
No. A36-413-841

Section of Law 319(a) (Leave Blank)

Date: April 3, 1982

(1) My full true and correct name is Yueh Shiao YANG (Full true name without abbreviations)

(2) I now live at 816 Chester Ave. (Number and street.)
San Marino, CA. 91108 (City, county, state, zip code)

(3) I was born on 7-15-20 (Month) (Day) (Year) in Shanghai, Kiangsu, CHINA (City or town) (County, province, or state) (Country)

(4) I request that my name be changed to Frank Yueh-Shiao YANG

(5) Other names I have used are: same (Include maiden name) Sex: ☒ Male ☐ Female

(6) Was your father or mother ever a United States citizen? ☐ Yes ☒ No (If "Yes", explain fully)

(7) Can you read and write English? ☒ Yes ☐ No

(8) Can you speak English? ☒ Yes ☐ No

(9) Can you sign your name in English? ☒ Yes ☐ No

(10) My lawful admission for permanent residence was on 8-1-1978 (Spouse is U.S. Citizen) (Month) (Day) (Year) under the name of YANG, YUEH-SHIAO at Los Angeles, CA. (City) (State)

(11) (a) I have resided continuously in the United States since August 1, 1978 (Month) (Day) (Year)

(b) I have resided continuously in the State of California since August 1, 1978 (Month) (Day) (Year)

(c) During the last five years I have been physically in the United States for a total of 33½ months.

From -	To -	Street Address	City and State
(a) July, 1980	Present Time	816 Chester Avenue	San Marino, CA.
(b) August, 1978	July, 1980	569 Woodland Road	Pasadena, CA.
(c) , 19	, 19		
(d) , 19	, 19		

(14) (a) Have you been out of the United States since your lawful admission as a permanent resident? ☒ Yes ☐ No

If "Yes" fill in the following information for every absence of *less than 6 months*, no matter how short it was.

Date Departed	Date Returned	Name of Ship, or of Airline, Railroad Company, Bus Company, or Other Means Used to Return to the United States	Place or Port of Entry Through Which You Returned to the United States
11-10-78	2-16-79	China Airline	LOS
4-7-79	6-15-79	China Airline	LOS
7-28-79	11-23-79	China Airline	LOS

(cont. below)

(b) Since your lawful admission, have you been out of the United States for a period of 6 *months or longer*? ☐ Yes ☒ No

If "No", state "None"; If "Yes", fill in following information for every absence of more than 6 months.

Date Departed	Date Returned	Name of Ship or of Airline, Railroad Company, Bus Company, or Other Means Used to Return to the United States	Place or Port of Entry Through Which You Returned to the United States
2-9-80	3-23-80	China Airline	Los Angeles, CA.
1-10-81	2-6-81	" "	LOS

EXHIBIT No. 8
OCT 26 1992
(DATE) (INITIALS)

(OVER)

(15) The law provides that you may not be regarded as qualified for naturalization, if you knowingly committed certain offenses or crimes, even though you may not have been arrested. Have you ever, in or outside the United States:

(a) knowingly committed any crime for which you have not been arrested? ☐ Yes ☒ No

(b) been arrested, cited, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance, including traffic regulations? ☐ Yes ☒ No

If you answer "Yes" to (a) or (b), give the following information as to each incident.

	When	Where (City)	(State)	(Country)	Nature of Offense	Outcome or Case, If Any
(a)						
(b)						
(c)						
(d)						
(e)						

(16) List your present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and your foreign military service. (If none, write "None.")

(a) _____ 19___ to 19___
(b) _____ 19___ to 19___
(c) _____ 19___ to 19___
(d) _____ 19___ to 19___
(e) _____ 19___ to 19___
(f) _____ 19___ to 19___
(g) _____ 19___ to 19___

(17) (a) Are you now, or have you ever, in the United States or in any other place, been a member of, or in any other way connected or associated with the Communist Party? (If "Yes", attach full explanation) ☐ Yes ☒ No

(b) Have you ever knowingly aided or supported the Communist Party directly, or indirectly through another organization, group or person? (If "Yes", attach full explanation) ☐ Yes ☒ No

(c) Do you now or have you ever advocated, taught, believed in, or knowingly supported or furthered the interests of Communism? (If "Yes", attach full explanation) ☐ Yes ☒ No

(18) During the period March 23, 1933 to May 8, 1945, did you serve in, or were you in any affiliated with, either directly or indirectly, any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, citizen unit, unit of the Nazi Party or SS, government agency or office, extermination camp, concentration camp, prisoner of war camp, prison, labor camp, detention camp or transit camp, under the control of or affiliated with:

(a) the Nazi Government of Germany ☐ Yes ☒ No

(b) any Government in any area occupied by, allied with, or established with the assistance or cooperation of, the Nazi Government of Germany? ☐ Yes ☒ No

(19) During the period March 23, 1933 to May 8, 1945, did you ever order, incite, assist, or otherwise participate in the persecution of any person because of race, religion, national origin, or political opinion? ☐ Yes ☒ No

(20) Have you borne any hereditary title or have you been of any order of nobility in any foreign state? ☐ Yes ☒ No

(21) Have you ever been declared legally incompetent or have you ever been confined as a patient in a mental institution? ☐ Yes ☒ No

(22) Are deportation proceedings pending against you, or have you ever been deported or ordered deported, or have you ever applied for suspension of deportation? ☐ Yes ☒ No

(23) (a) My last Federal income tax return was filed 1981 (year) Do you owe any Federal taxes? ☐ Yes ☒ No

(b) Since becoming a permanent resident of the United States, have you:

—filed an income tax return as a nonresident? ☐ Yes ☒ No

—failed to file an income tax return because you regarded yourself as a nonresident? ☐ Yes ☒ No

(If you answer "Yes" to (a) or (b) explain fully.)

(24) Have you ever claimed in writing, or in any other way, to be a United States citizen? ☐ Yes ☒ No

(25) (a) Have you ever deserted from the military, air, or naval forces of the United States? ☐ Yes ☒ No

(b) If male, have you ever left the United States to avoid being drafted into the Armed Forces of the United States? ☐ Yes ☒ No

(26) The law provides that you may not be regarded as qualified for naturalization if, at *any* time during the period for which you are required to prove good moral character, you have been a habitual drunkard; committed adultery; advocated or practiced polygamy; have been a prostitute or procured anyone for prostitution; have knowingly and for gain helped any alien to enter the United States illegally; have been an illicit trafficker in narcotic drugs or marijuana; have received your income mostly from illegal gambling, or have given false testimony for the purpose of obtaining any benefits under this Act. Have you ever, *anywhere*, been such a person or committed any of these acts? (If you answer yes to any of these, attach full explanation.) ☐ Yes ☒ No

(27) Do you believe in the Constitution and form of government of the United States? ☒ Yes ☐ No

(28) Are you willing to take the full oath of allegiance to the United States? (See Instructions) ☒ Yes ☐ No

(29) If the law requires it, are you willing:

(a) to bear arms on behalf of the United States? (If "No", attach full explanation) ☒ Yes ☐ No

(b) to perform noncombatant services in the Armed Forces of the United States? (If "No", attach full explanation) ☒ Yes ☐ No

(c) to perform work of national importance under civilian direction? (If "No", attach full explanation) ☒ Yes ☐ No

(30) (a) If male, did you ever register under United States Selective Service laws or draft laws? ☐ Yes ☒ No

If "Yes" give date_____; Selective Service No._____; Local Board No._____; Present classification_____

(b) Did you ever apply for exemption from military service because of alienage, conscientious objections, or other reasons? ☐ Yes ☒ No

If "Yes," explain fully.....

0231

(31) If serving or ever served in the Armed Forces of the United States, give branch _____;
from _____, 19__ to _____, 19__; and from _____, 19__ to _____, 19__
☐ inducted or ☐ enlisted at N.A.; Service No. _____;
type of discharge _____ (Honorable, Dishonorable, etc.); rank at discharge _____;
reason for discharge _____ (discharge, conscientious objector, other)
☐ Reserve or ☐ National Guard from _____, 19__ to _____

(32) My occupation is Property management

List the names, addresses, and occupations (or types of business) of your employers during the last 5 years. (If none, write "None.")
List present employment FIRST.

From-	To-	Employer's Name	Address	Occupation or Type of Business
(a) August, 1978	Present Time	Yang & Yang Property Mangement	816 Chester Ave. San Marino, CA.	ppty mgmt.
(b) ____, 19__	____, 19__			
(c) ____, 19__	____, 19__			
(d) ____, 19__	____, 19__			

(33) Complete this block if you are or have been married.

I am married (Separated, married, divorced, widowed). The first name of my husband or wife is (was) Mary

We were married on 5-17-78 at Taipei, Taiwan. He or she was born at San Francisco, CA. U.S.A. on 2-15-31. He or she entered the United States at (place) n/a on (date) _____ for permanent residence and now resides ☐ with me ☐ apart from me at _____ (Show full address if not living with you.)

He or she was naturalized on _____ at _____; Certificate No. _____
or became a citizen by by birth in the U.S.. His or her Alien Registration No. is ---

(34) How many times have you been married? 2 How many times has your husband or wife been married? 1 If either of you has been married more than once, fill in the following information for each previous marriage.

Date Married	Date Marriage Ended	Name of Person to Whom Married	Sex	(Check One) Person Married Was Citizen ☐ Alien ☐	How Marriage Ended
(a) 1945	12-12-77	WANG, Hai Hsia		☐ ☒	divorced
(b)				☐ ☐	
(c)				☐ ☐	
(d)				☐ ☐	

(35) I have 3 (Number) children: (Complete columns (a) to (h) as to each child. If child lives with you, state "with me" in column (h), otherwise give city and State of child's residence.)

(a) Given Names	(b) Sex	(c) Place Born (Country)	(d) Date Born	(e) Date of Entry	(f) Port of Entry	(g) Alien Registration No.	(h) Now Living at-
H. C.	male	China	1-1-49	2-16-79	LOS	A36528169	Los Angeles, CA.
Kui Li	female	Taiwan	4-6-51	8-1-77	HHW	A36334754	with me
Li Chuan	"	"	8-29-53	2-16-79	LOS	A36527943	" "
Li Chu	"	"	12-7-55	2-16-79	LOS	A36527944	" "
Li Jui	"	"	9-30-58	2-16-79	LOS	A36527945	" "

(36) READ INSTRUCTION NO. 6 BEFORE ANSWERING QUESTION (36)

I do not (Do) / (Do Not) want certificates of citizenship for those of my children who are in the U.S. and are under age 18 years that are named below.

(Enclose $15 for each child for whom you want certificates, otherwise, send no money with this application.)

_____
(Write names of children under age 18 years and who are in the U.S. for whom you want certificates)

If present spouse is not the parent of the children named above, give parent's name, date and place of naturalization, and number of marriages.

0232

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(4) Gwok Shiao Jang 8-27-82

Signature of person preparing form, if other than applicant.	SIGNATURE OF APPLICANT Gwok Shiao Jang
I declare that this document was prepared by me at the request of applicant and is based on all information of which I have any knowledge. SIGNATURE	ADDRESS AT WHICH APPLICANT RECEIVES MAIL 816 Chester Avenue San Marino, CA. 91108
ADDRESS: DATE:	APPLICANT'S TELEPHONE NUMBER 795-6374

TO APPLICANT: DO NOT FILL IN BLANKS BELOW THIS LINE.

NOTE CAREFULLY.—This application must be sworn to before an officer of the Immigration and Naturalization Service at the time you appear before such officer for examination on this application.

AFFIDAVIT

I do swear that I know the contents of this application comprising pages 1 to 4, inclusive, and the supplemental forms thereto, No(s). _____, subscribed to by me; that the same are true to the best of my knowledge and belief; that corrections numbered (1) to (2) were made by me or at my request; and that this application was signed by me with my full, true, and correct name, SO HELP ME GOD:

Gwok Shiao-Jang
(Complete and true signature of applicant)

Subscribed and sworn to before me by applicant at the preliminary investigation (A.) at Los Angeles

this 27 day of August, 1982.

I certify that before verification the above applicant stated in my presence that he/she had (heard) read the foregoing application, corrections therein and supplemental form(s) and understood the contents thereof.

Francisco G. Flores
(Naturalization examiner)

It's a very nice day in California.
(For demonstration of applicant's ability to write English)

(1st witness. Occupation) _____

(2nd witness. Occupation) _____

Nonfiled _____

(Date, Reasons)

NOTICE TO APPLICANTS:

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Supreme Court of the United States

No. 95-938

IMMIGRATION AND NATURALIZATION SERVICE,
PETITONER

v.

YUEH-SHAIO YANG

[Filed Feb. 20, 1996]

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

(4)

No. 95-938

In the Supreme Court of the United States

OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Attorney General, when deciding whether to grant a discretionary waiver of deportation under Section 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1)(H), may take into account acts of fraud that the alien committed before and after his fraudulent entry into the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-938

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

YUEH-SHAIO YANG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 58 F.3d 452. The opinion of the Board of Immigration Appeals (Pet. App. 5a-11a) and the oral decision of the immigration judge (Pet. App. 12a-25a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1995. A petition for rehearing was denied on October 5, 1995. Pet. App. 26a. The petition for a writ of certiorari was filed on December 13, 1995, and was granted on February 20, 1996. J.A. 13; 116 S. Ct. 907. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent current and former versions of Sections 212 and 241 of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)(A), (6)(C) and (7)(A), 1182(*i*), 1251(a)(1)(A) and (H); 8 U.S.C. 1182(a)(14), (19) and (20), 1251(a)(1) and (f) (1988)) are reprinted in relevant part at App., *infra*, 1a-10a.

STATEMENT

1. Respondent, Yueh-Shaio Yang, and his wife, Hai-Hsia Yang, are natives of the People's Republic of China. Pet. App. 13a. They were married in China in 1940, and they moved to Taiwan in 1945. They had six children together. *Id.* at 8a-9a, 16a.

In 1977, while in the United States as a visitor, respondent's wife was introduced by a friend to an individual who told her that, if she were single and willing to pay $60,000, she could obtain United States citizenship or permanent residency. Pet. App. 6a, 15a. As a result, respondent and his wife obtained a divorce in Taiwan, and respondent provided the $60,000 to procure United States citizenship for his wife. Respondent's wife returned to the United States in 1978, claiming to be a United States citizen based on a fraudulent U.S. birth certificate and passport in the name of Mary Wong, which were purchased with the $60,000. *Id.* at 6a-7a, 16a, 18a; see C.A. Excerpts of Record 195-196.

After he helped his wife obtain fraudulent entry to the United States under her assumed identity, respondent remarried his wife in Taiwan under that false identity. Following his remarriage, respondent fraudulently sought and, on May 24, 1978, obtained, from a United States Consulate official in Taipei, Taiwan, an immigrant visa to enter the United States

as the spouse of a citizen of the United States. See J.A. 1-4. Respondent obtained the visa based on an application he executed under oath before the United States consular officer. *Ibid.* In support of the application, respondent submitted a marriage certificate reflecting that he married Mary Wong in Taipei, Taiwan, Republic of China, and a birth certificate reflecting the birth of Mary Wong on February 25, 1931, in San Francisco, California. Resp. C.A. Br. 2. Based on the fraudulently obtained visa, respondent entered the United States at Los Angeles, California, on August 1, 1978, as a permanent resident, on the falsely claimed ground that he was married to a United States citizen. Pet. App. 7a, 16a-17a.[1]

Respondent has resided in California since his unlawful entry in 1978. He left the country on several occasions and returned each time based on his fraudulently obtained permanent resident status. See J.A. 9. Over the course of that time, respondent participated in lucrative business ventures. At the time of his deportation hearing in 1992, respondent had substantial financial assets, including "over $3

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[1] Following respondent's fraudulent entry, he and his wife successfully petitioned for immigrant status for several of their adult children. Pet. App. 16a-17a; Admin. Rec. 239. One of those sons then attempted to bring another of respondent's daughters into the United States by purporting to marry her and have her admitted as his wife. *Ibid.* That daughter, acting with the assistance of a former examiner of the Immigration and Naturalization Service (INS), participated in additional immigration fraud by aiding others to fraudulently obtain naturalization. The daughter and the examiner were prosecuted and convicted. See Pet. App. 17a; Admin. Rec. 239. Another daughter earlier had come to the United States through her husband and his relatives and, through them, became a naturalized United States citizen. Pet. App. 17a.

million in property and real estate and liquid assets in cash, stocks, etc. of $700,000." Pet. App. 3a.

In 1982, four years after his initial fraudulent entry, respondent submitted to the Immigration and Naturalization Service (INS) an application to file a petition for naturalization. J.A. 9-12. Respondent swore to the truth of the information contained in that form. See J.A. 12. Respondent made several false statements and misrepresentations in the form. On the first page, respondent stated that his spouse was a United States citizen. He also stated that he had been lawfully admitted for permanent residence. J.A. 9. On the third page of the form, respondent stated that he married his current wife, "Mary," on May 17, 1978, in Taiwan, and that she had been born in San Francisco, California, was a citizen by birth in the United States, and had been married only one time. J.A. 11. Respondent stated that he, by contrast, had been married two times. He listed, as his previous marriage, his marriage in 1945 to Hai-Hsia Yang, and indicated that it had ended in divorce in 1977. *Ibid.* Respondent also was interviewed, in 1982, in connection with his naturalization application and, during that interview, he misrepresented that his wife was a United States citizen by birth. Resp. C.A. Br. 2.

While respondent's naturalization petition was pending, his wife decided to abandon her identity as "Mary Wong." One of respondent's daughters had lawfully become a United States citizen (see note 1, *supra*), and she filed an immediate relative petition for respondent's wife under the wife's true name. Accordingly, respondent and his wife (under the assumed name Mary Wong) obtained another divorce in 1985. The INS ultimately learned of respondent's unlawful entry by fraud in the course of other investi-

gations, including an investigation of the immigration fraud committed by respondent's children. See note 1, *supra*.

2. a. In January 1992, the INS issued respondent an order to show cause why he should not be deported, alleging that he was subject to deportation under Section 241(a)(1)(A) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1251(a)(1)(A), because he was excludable from the United States at the time of his entry.[2] Specifically, the INS alleged that, at the time of his entry, respondent had been excludable under Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14) (1988), because he had sought to enter for purposes of working but did not have the required certification from the Secretary of Labor, and under Section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20) (1988), because respondent did not possess the requisite valid visa or other entry document.[3] See J.A. 1-6.

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[2] Prior to the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, Section 241(a) of the INA listed 20 categories of deportable aliens. See 8 U.S.C. 1251(a) (1988). The 1990 Act consolidated those categories into five broader categories. § 602(a), 104 Stat. 5077-5081. The provision identifying excludable aliens as deportable, which is now found at Section 241(a)(1)(A) of the Act, 8 U.S.C. 1251(a)(1)(A), was formerly Section 241(a)(1), 8 U.S.C. 1251(a)(1) (1988). The version of Section 241 enacted in 1990 applies to deportation proceedings, such as respondent's, for which notice was provided to the alien on or after March 1, 1991. See Immigration Act of 1990, § 602(d), 104 Stat. 5082.

[3] Prior to the Immigration Act of 1990, Section 212(a) of the INA listed 33 categories of excludable aliens. See 8 U.S.C. 1182(a) (1988). The 1990 Act consolidated those categories into nine broader categories. § 601(a), 104 Stat. 5067-5075. The former version applies to individuals, such as respondent, who

Respondent's case proceeded to a hearing before an immigration judge. At the hearing, the INS lodged a third charge of deportability against respondent, alleging that he was subject to deportation under Section 241(a)(1)(A) of the INA because he was excludable at the time of his entry to the United States under Section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19) (1988), on the ground that he had procured a visa or other documentation by fraud or by willfully misrepresenting a material fact. Pet. App. 5a, 13a; see J.A. 7-8.[4] Respondent conceded that he was deportable, and admitted all the allegations against him. Pet. App. 13a; Resp. C.A. Br. 3.

Respondent filed a request for a waiver of deportation under Section 241(a)(1)(H) of the Act, 8 U.S.C. 1251(a)(1)(H). Pet. App. 13a.[5] Section 241(a)(1)(H)

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entered the United States before June 1, 1991. See Immigration Act of 1990, § 601(e)(1), 104 Stat. 5077.

The provision excluding aliens who seek to enter the United States without the required certificate from the Secretary of Labor is now found at Section 212(a)(5) of the Act, 8 U.S.C. 1182(a)(5), but was formerly Section 212(a)(14), 8 U.S.C. 1182(a)(14) (1988). The provision excluding aliens who do not possess a valid immigrant visa or other required entry or travel document is now found at Section 212(a)(7)(A) of the Act, 8 U.S.C. 1182(a)(7)(A), but was formerly Section 212(a)(20), 8 U.S.C. 1182(a)(20) (1988).

[4] The provision excluding aliens who procure a visa, other documentation, or entry by fraud or misrepresentation is now found at Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i), but was formerly Section 212(a)(19), 8 U.S.C. 1182(a)(19) (1988). As noted above, see note 3, *supra*, the version in effect prior to 1990 applies to respondent.

[5] The relief now available under Section 241(a)(1)(H) was previously available under Section 241(f), 8 U.S.C. 1251(f) (1988). Section 241(a)(1)(H) was enacted as part of the Im-

provides that the Act's provision for deportation of an alien who was excludable at the time of entry due to fraud or misrepresentation may be waived, "in the discretion of the Attorney General," for

> any alien (other than an alien described in paragraph (4)(D) [relating to certain aliens who assisted in Nazi persecution or engaged in genocide]) who—
>
> (i) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and
>
> (ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title [relating to possession of valid labor certifications and immigrant visas, respectively] which were a direct result of that fraud or misrepresentation.

8 U.S.C. 1251(a)(1)(H).[6]

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migration Act of 1990, §602(a), 104 Stat. 5079, to replace former Section 241(f) (repealed by Section 602(b)(1) of the 1990 Act, 104 Stat. 5081). As noted above, see note 2, *supra*, the version of Section 241 enacted in 1990 applies to respondent's deportation proceedings.

[6] Section 241(a)(1)(H) further provides that such a waiver for fraud or misrepresentation shall also operate to waive deportation based on grounds of inadmissibility at entry directly resulting from such fraud or misrepresentation. That further statutory provision codifies prior administrative practice. See *INS* v. *Errico*, 385 U.S. 214, 217 (1966).

Respondent testified at his deportation hearing. He "claimed that [he] had believed in the propriety of [his] method of entering the United States," and that he did not find it "unusual that [his] wife would adopt a different name, present another's birth certificate in order to obtain immigration benefits, or be required to obtain a sham divorce." Pet. App. 8a. Respondent also testified that he was indigent and that he was not aware of other acts of immigration fraud committed by his children until after they had been discovered by the INS. *Id.* at 8a, 23a. The INS submitted to the immigration judge a copy of the fraudulent application for naturalization as a United States citizen that respondent filed in 1982. *Id.* at 19a, 23a.

The immigration judge denied respondent's request for a waiver of deportation. Pet. App. 12a-25a. The immigration judge found that respondent was statutorily eligible for a Section 241(a)(1)(H) waiver, but concluded that he did not deserve such a waiver as a matter of discretion. *Id.* at 24a-25a.

The immigration judge detailed his reasoning, including the factors that he considered in exercising his discretion. Relying on judicial precedent that had, in turn, relied on the Attorney General's identification of what factors will be considered in determining whether to waive deportation based on fraud or misrepresentation at the time of the alien's initial entry, the immigration judge "d[id] not take into account the original fraud perpetrated against the United States Government by [respondent]; that is, * * * respondent's coming to this country and making claims falsely to be a spouse of a United States citizen." Pet. App. 14a (citing *Liwanag* v. *INS*, 872 F.2d 685, 687 (5th Cir. 1989)); see also Pet.

App. 21a. The judge pointed out, however, that a waiver under Section 241(a)(1)(H) could "be appropriately denied if an alien continues in his fraud or in other subsequent acts from the original fraud or misrepresentation." *Id.* at 14a-15a. The judge accordingly based his decision in part on respondent's additional fraudulent conduct, which included the filing of a fraudulent application for naturalization in 1982 and his attempt to obtain the benefit of United States citizenship through that fraud. *Id.* at 23a, 24a-25a.

In weighing the equities in the case to determine whether to grant the waiver of deportation, the immigration judge also considered the fact that respondent was "not * * * candid in all of his testimony and presentations to the [immigration] Court," Pet. App. 23a, including insofar as he originally claimed indigency and need for familial support. After persistent questioning by the judge, respondent admitted that he had "over $3 million in property and real estate[,] and liquid assets in cash, stocks, etc., of $700,000." *Id.* at 23a-24a. The immigration judge found that an order that respondent be deported to Taiwan would not require him to return to an unfamiliar country, because respondent had spent most of his life in Taiwan, understood the customs and language there, and had members of his immediate family living there who appeared to have substantial economic power and wealth. *Id.* at 24a. Finally, the immigration judge noted that respondent based his waiver request on the fact that he had relatives residing in the United States, but the judge did not consider that to be an equity in respondent's favor because several of those family members had obtained residence in this country through fraud. *Ibid.*

b. The Board of Immigration Appeals (Board or BIA) dismissed respondent's appeal. Pet. App. 5a-11a.[7] The Board agreed with the immigration judge that respondent "is statutorily eligible for the section 241(a)(1)(H) waiver, which may operate to excuse the initial fraud of entering the United States with an immigrant visa obtained under the auspices of his wife's fraudulent claim to citizenship." *Id.* at 9a-10a. The Board pointed out that "[t]his initial fraud was admitted by the respondent and concededly disregarded by the immigration judge in his evaluation of the merits of the respondent's application for discretionary relief." *Ibid.*

Turning to whether respondent should be granted a deportation waiver as a matter of discretion, the Board observed that, "[a]s with other discretionary applications for a waiver of deportability," Section 241(a)(1)(H) "necessitates a balancing of the alien's undesirability as a permanent resident [against] the social and humane considerations present to determine whether according him such relief is in the best

[7] The INS also issued respondent's wife an order to show cause why she should not be deported. A few months after the INS began the proceedings against respondent and his wife, they remarried again using the wife's true name. Pet. App. 7a-8a, 17a-18a. Their two cases were consolidated for presentation before the immigration judge, *id.* at 6a n.1, who denied the request for a Section 241(a)(1)(H) waiver by respondent's wife as well, *id.* at 25a. The BIA reviewed the matters simultaneously, but issued separate decisions. *Id.* at 6a n.1. During the pendency of her appeal before the Board, respondent's wife departed from the United States. The Board, accordingly, deemed her appeal withdrawn, and the decision of the immigration judge became final. Admin. Rec. 4-5. As a result, the case of respondent's wife was not before the court of appeals and is not before this Court.

interest of this country." Pet. App. 10a (citing *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978) (discussing waiver of deportation under INA § 212(c), 8 U.S.C. 1182(c)). The Board found that the adverse factors in respondent's case included respondent's "acts of immigration fraud before and after his 1978 entry into the United States and his apparent lack of candor during the deportation hearing regarding his knowledge of the significance of his fraud." Pet. App. 10a. The Board found that respondent "ha[d] engaged in a pattern of violating this country's immigration laws through fraud," *ibid.*, noting respondent's first sham divorce to facilitate his wife's unlawful entry, his own unlawful entry, his fraudulent 1982 naturalization petition, and his second sham divorce to facilitate his wife's second admission to the United States (this time through an immigrant visa). The Board reasoned that, "[a]lthough the respondent's fraud in entering the United States in 1978 can be waived, his remaining acts involving fraud cannot." *Ibid.* (citing *Start* v. *INS*, 803 F.2d 539 (1986), opinion withdrawn upon dismissal of petition for review as moot, 862 F.2d 787 (9th Cir. 1988)).

The Board found that the factors weighing in respondent's favor consisted of his residence in this country for 15 years, his investment of a substantial amount of money in this country resulting in significant property and business ties, and his three children who reside in this country. Pet. App. 11a. The Board concluded, however, as did the immigration judge, that respondent did not merit relief in the exercise of discretion. The Board pointed to the fact that respondent claimed that he was no longer active in his business here, that there was no evidence that he could not receive effective medical treatment in

Taiwan for his hypertension, and that respondent previously lived in Taiwan as an adult for more than 30 years. *Ibid.* The Board also relied on the fact that one of respondent's daughters lived in Taiwan, two of his children who resided in the United States spent a large part of time outside the country, and his wife had returned to live in Taiwan. *Ibid.* The Board concluded that "the serious nature of respondent's continuing course of immigration violations, both before and after his entry in 1978, outweighs the factors in his favor," and it dismissed the appeal. *Ibid.*

3. The court of appeals granted respondent's petition for review, vacated the Board's decision, and remanded the case for further proceedings. Pet. App. 1a-4a. The court held that, in balancing the equities in this case, the Board erred by considering respondent's participation in his wife's fraudulent entry into this country, including his sham divorces and marriages, because those acts were "inextricably intertwined with [respondent's] own efforts to secure entry into the country and must be considered part of the initial fraud." *Id.* at 2a. The court also ruled that the Board improperly considered respondent's fraudulent application for naturalization as a United States citizen because, in the court's view, that application "must be considered an extension of the initial fraud." *Id.* at 2a-3a (relying on *Delmundo* v. *INS*, 43 F.3d 436, 440-441 (9th Cir. 1994)). The court recognized that the Board also had properly considered, as an adverse factor, respondent's lack of candor before the immigration judge regarding his knowledge of the immigration fraud, his claim not to have been involved in any intentional wrongdoing, and his asserted need for financial support from his children. Therefore, the Court remanded the case for a reweighing of the

equities, "considering solely as an adverse factor [respondent's] allegedly dishonest testimony before the immigration court." *Id.* at 3a-4a.

The court of appeals denied the INS's petition for rehearing, and rejected its suggestion of rehearing en banc. Pet. App. 26a.

SUMMARY OF ARGUMENT

The Attorney General did not abuse her discretion by considering, through her delegates the Board of Immigration Appeals (Board or BIA) and the immigration judge, respondent's acts of fraud and misrepresentation, both prior to and subsequent to his fraudulent entry, in deciding whether to grant respondent a waiver of deportation under Section 241(a)(1)(H) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1251(a)(1)(H). Section 241(a)(1)(H) permits a waiver of deportation in certain cases where the alien is deportable because of excludability based on fraud or misrepresentation at the time of his initial entry and the alien is an immediate relative of a United States citizen or lawful resident alien. The Act commits to the discretion of the Attorney General the selection and weighing of factors to be considered in making that waiver determination. Section 241(a)(1)(H) requires that an alien meet three threshold requirements to be eligible for a waiver, but places no restrictions on the factors that may be considered by the Attorney General in exercising her discretion whether to grant a waiver to any particular eligible alien. This grant of unfettered discretion to the Attorney General under the INA is consistent with the authority granted the Attorney General under other provisions of the Act, authority that this Court

correctly has likened to the executive's power to pardon.

The history of Section 241(a)(1)(H) confirms that Congress intended to vest the Attorney General with sole discretion to determine which cases of initial-entry fraud merit a waiver of deportation. The earlier version of the statute did not provide for a discretionary waiver, but rather established a blanket exemption from deportation for all aliens who met the statutory eligibility requirements. In 1981, Congress rejected a proposal to abolish the waiver altogether and, in accordance with the request of the Department of Justice, it instead transformed that mandatory exemption into a waiver to be granted in the discretion of the Attorney General.

In exercising her authority under Section 241(a)(1)(H), the Attorney General, through her delegate the BIA, follows an approach similar to the approach she follows under other provisions of the INA that grant her similar discretion. The Board balances the alien's undesirability as a permanent resident against the relevant humane considerations to determine whether granting him or her a waiver is in the country's best interests. The Board has chosen not to weigh the initial-entry fraud as an adverse factor when deciding whether to grant a deportation waiver under Section 241(a)(1)(H). The Board does, however, consider as an adverse factor other fraud or misrepresentation in which the alien has engaged. That approach is based on earlier decisions by the Immigration and Naturalization Service that, in determining whether to grant a discretionary waiver of exclusion under Section 212(*i*) of the Act, 8 U.S.C. 1182(*i*), to aliens who had committed fraud, the initial fraud should not be weighed as an adverse factor

because that was the act for which the alien sought forgiveness through the waiver. Accordingly, the Board acted well within its discretion in adopting its initial-entry-fraud approach in making waiver determinations under Section 241(a)(1)(H) and did not abuse its discretion by application of that principle in this case. The Board properly weighed as adverse factors in the instant case respondent's continuing pattern of violating this country's immigration laws, including the fact that respondent submitted a fraudulent application for naturalization.

ARGUMENT

THE ATTORNEY GENERAL DID NOT ABUSE HER DISCRETION BY CONSIDERING RESPONDENT'S PATTERN OF IMMIGRATION FRAUD IN DECIDING WHETHER TO GRANT HIM A WAIVER OF DEPORTATION UNDER SECTION 241(a)(1)(H) OF THE IMMIGRATION AND NATIONALITY ACT

A. Section 241(a)(1)(H) Commits To The Discretion Of The Attorney General The Selection And Weighing Of Factors To Be Considered In Making A Waiver Determination

1. Section 241(a) of the Immigration and Nationality Act (INA or Act) provides that any alien who falls within one or more of several statutory categories "shall, upon the order of the Attorney General, be deported." 8 U.S.C. 1251(a). The first statutory category of aliens subject to deportation includes all aliens who were excludable at the time they entered the United States. 8 U.S.C. 1251(a)(1). Whether an alien was excludable at the time of entry depends on whether, at that time, the alien fell within one or more of several different categories set forth

in Section 212 of the Act, 8 U.S.C. 1182, including aliens who procured visas, other documents, or entry into the United States by fraud or misrepresentation. See INA § 212(a)(19), 8 U.S.C. 1182(a)(19) (1988) (now found at INA § 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(C)(i)).[8]

Hence, an alien in the United States who procured his initial entry into this country by fraud or willful misrepresentation is subject to deportation when the deception is discovered. Section 241(a)(1)(H) of the Act (formerly Section 241(f)),[9] however, permits the Attorney General to grant such an alien a waiver of deportation if the alien meets certain requirements. Specifically, Section 241(a)(1)(H) provides that deportation based on excludability because of fraud or misrepresentation at the time of entry may be waived, "in the discretion of the Attorney General," if (1) the alien is the spouse, parent, or child of a citizen or lawful resident alien; (2) the alien was in possession of an immigrant visa or equivalent document (regardless of its validity, but indicative of the fact that the alien submitted himself or herself for inspection) at the time of entry; and (3) the alien, at the time of entry, was eligible (aside from the fraud or misrepresentation) for admission to the United States. See 8 U.S.C. 1251(a)(1)(H).

The three statutory eligibility requirements constitute the only conditions imposed by Congress on the authority vested in the Attorney General under Section 241(a)(1)(H). Significantly, moreover, the

[8] The earlier version of Section 212 applies to respondent because he entered before June 1, 1991. See note 3, *supra*.

[9] The current version of Section 241 applies to respondent's deportation proceedings. See note 2, *supra*.

statutory text places no restrictions on the factors that may be considered by the Attorney General and her delegates[10] in exercising her discretion whether to grant a waiver of deportation under Section 241(a)(1)(H) if the three statutory conditions of eligibility for such a waiver are satisfied. Thus, Section 241(a)(1)(H), on its face, vests the Attorney General with essentially unfettered discretion to grant or withhold relief from deportation to an eligible alien. Compare *United States* v. *Alaska*, 503 U.S. 569, 576 (1992) ("The statute itself [Section 10 of the Rivers and Harbors Appropriation Act of 1899] contains no criteria by which the Secretary is to make an authorization decision; on its face, the provision appears to give the Secretary unlimited discretion to grant or deny a permit.").

This understanding of Section 241(a)(1)(H) is consistent with the pattern of the INA as a whole regarding the discretionary authority of the Attorney General. For example, this Court explained with regard to the Attorney General's similar authority to suspend deportation under Section 244(a)(5) of the Act, 8 U.S.C. 1254(a)(5):

> Congress has provided a general plan dealing with the deportation of those aliens who have not obtained citizenship although admitted to residence. Since it could not readily make exception

[10] The Attorney General has delegated her authority to direct the administration of the INS and to enforce the INA and other laws relating to the immigration and naturalization of aliens to the Commissioner of the INS, 8 C.F.R. 2.1, and the Executive Office for Immigration Review, which includes the Board of Immigration Appeals, 8 C.F.R. 3.0, 3.1(a) and (b), and immigration judges, 8 C.F.R. 3.10, 242.8.

> for cases of unusual hardship or extenuating circumstances, those matters were left to the consideration and discretion of the Attorney General.

Jay v. *Boyd*, 351 U.S. 345, 361 (1956). In *Jay* v. *Boyd* and other decisions, the Court has repeatedly emphasized the breadth of the Attorney General's discretion in granting relief under the INA. See *id.* at 354 ("Although such aliens have been given a right to a discretionary determination on an application for suspension, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace.") (citation omitted); *id.* at 357-358 ("suspension of deportation is * * * dispensed according to the unfettered discretion of the Attorney General"); *Foti* v. *INS*, 375 U.S. 217, 222 n.7 (1963) (expressly reaffirming *Jay* v. *Boyd*'s description of the Attorney General's discretion); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144-146 (1981) (per curiam); *INS* v. *Rios-Pineda*, 471 U.S. 444, 450-452 (1985); *INS* v. *Doherty*, 502 U.S. 314, 323-324 (1992); *id.* at 331, 333-334 (Scalia, J., concurring in the judgment in part and dissenting in part); see also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 444-445 (1987). Indeed, the Court has likened the discretion of the Attorney General with respect to suspension of deportation to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *Jay* v. *Boyd*, 351 U.S. at 354 n.16 (quoting *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (Hand, J.)). The Attorney General's authority to forgive fraud or misrepresentations at the time of entry should be viewed in the same light, as essentially a power of pardon and dispensation

exercised as a "matter of grace," according to the Attorney General's "unfettered discretion."

2. The history and background of Section 241(a)(1)(H) confirm that Congress intended to grant the Attorney General broad discretion to determine which cases of initial-entry fraud merit a waiver of deportation.

a. As originally enacted in 1952, the Immigration and Nationality Act did not provide for a waiver of deportation for aliens who were excludable because they entered by fraud. See ch. 477, § 241(c), 66 Stat. 208. In 1957, however, Congress added a provision that mandated a waiver for an alien within the United States who had entered by fraud or misrepresentation but was otherwise admissible at the time of entry, if the alien was a spouse, parent, or child of a United States citizen or lawfully admitted permanent resident. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 7, 71 Stat. 640 (codified at 8 U.S.C. 1251a (1958)). That mandatory deportation waiver was reenacted in 1961 as Section 241(f) of the INA. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 16, 75 Stat. 655 (codified at 8 U.S.C. 1251(f) (1964)); see *INS* v. *Errico*, 385 U.S. 214, 220-223 (1966).

Both the 1957 and 1961 Acts also provided that exclusion of an alien could be waived in similar circumstances (*i.e.*, where exclusion normally would have been required due to fraud or misrepresentation by an alien attempting to enter) for certain similarly situated aliens outside the United States. The waiver of exclusion was not mandatory, however, but was instead committed to the discretion of the Attorney General. See 8 U.S.C. 1251a (1958); 8 U.S.C. 1182(*i*)

(1964); H.R. Rep. No. 1199, 85th Cong., 1st Sess. 10-11 (1957); S. Rep. No. 1057, 85th Cong., 1st Sess. 5 (1957). The waiver of exclusion remains discretionary today, as set forth in Section 212(*i*) of the Act, 8 U.S.C. 1182(*i*).

b. Over the course of the 20 years following the enactment of Section 241(f), its mandatory waiver of deportation became "a major source of controversy and litigation." H.R. Rep. No. 264, 97th Cong., 1st Sess. 25 (1981). As early as 1973, Congress was informed by the Department of Justice that "litigants ha[d] sought to expand section 241(f) into a charter of amnesty, waiving all restrictions for those who had entered the United States through fraud." *Ibid.* By 1975, this Court observed that decisions of the lower courts under Section 241(f) might be "summarized in the language of Macduff: 'Confusion now hath made his masterpiece.'" *Reid* v. *INS*, 420 U.S. 619, 628 (1975).[11]

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[11] The *Reid* Court described some of the confusion that had arisen under Section 241(f):

> Aliens entering the United States under temporary visitor permits, who acquire one of the specified familial relationships described in § 241(f) after entry, have argued with varying results that their fraudulent intent upon entry to remain in this country permanently cloaks them with immunity from deportation even though they overstayed their visitor permits. Acceptance of this theory leads to the conclusion that § 241(f) waives a substantive ground for deportation based on overstay if the alien can affirmatively prove his fraudulent intent at the time of entry, but grants no relief to aliens with exactly the same familial relationship who are unable to satisfactorily establish their dishonesty. Balking at such an irrational result, one court has gone so far as to declare that § 241(f) waives deportability under § 241(a)(1) even though no fraud is involved if the alien is able merely to establish the requisite familial tie.
>
> Nor has there been agreement among those courts which have construed § 241(f) to waive substantive grounds for deportation under § 212 other than for fraud delineated in § 212(a)(19) as to which other grounds are waived.

420 U.S. at 628-629 (footnote and citations omitted). The *Reid* Court also noted that the waiver had been "designed primarily to prevent the deportation of refugees from totalitarian nations for harmless misrepresentations made solely to escape persecution," and was not intended "to arm the dishonest alien seeking admission to our country with a sword by which he could avoid the numerous substantive grounds for exclusion unrelated to fraud" set forth in Section 212 of the Act. *Id.* at 630-631 & n.8.

In 1979, a bill was introduced in Congress that, among other things, would have eliminated Section 241(f) altogether. See H.R. 5087, 96th Cong., 1st Sess. At a congressional hearing that same year, the Acting Commissioner of INS testified that the Department of Justice favored enactment of the bill except for two provisions, one of which was the proposed elimination of Section 241(f). *Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 4, 7 (1979). He acknowledged that Section 241(f) was creating problems, emphasizing that "[t]he issue of the proper interpretation of [Section 241(f)] ha[d] reached the Supreme Court twice [in *Errico* and *Reid*, *supra*] with no clear resolution, and differing administrative and judicial interpretations ha[d] left the law in a state of confusion which ma[de] it virtu-

ally impossible for the INS to uniformly administer" the waiver. *Id.* at 4. The Acting Commissioner urged Congress not to eliminate the provision, however, but instead to clarify it and to "make the waiver discretionary with the Attorney General." *Ibid.* He emphasized that the Department of Justice's approach was "preferable to the elimination of section 241(f) because it allows the INS to consider relief in cases where the misrepresentation may be outweighed by family ties." *Id.* at 4, 7-8.

The House Committee revised the bill consistent with the suggestion of the Department of Justice. The House Judiciary Committee's Report accompanying the revised bill echoed the hearing testimony by the Acting Commissioner of INS regarding the controversy created by the then extant version of Section 241(f). See H.R. Rep. No. 264, *supra*, at 25. The Committee explained that the "original intent of the section was simply to waive relatively minor grounds for deportation—those arising out of misrepresentations in arranging entry—for aliens with a close family relative who was a United States citizen or lawful permanent resident." *Ibid.* The Committee recognized that the scope of the waiver had become increasingly unclear and had led to litigation, and it accordingly recommended that the statutory language be clarified in certain respects and that the waiver be made discretionary with the Attorney General rather than mandatory. *Ibid.* Those changes, the Committee concluded, "should obviate the need for further litigation, and promote the uniform administration of this section." *Ibid.* Section 241(f) was amended by Congress in the manner proposed by the House Judiciary Committee, see Immigration and Nationality Act Amendments of

1981, Pub. L. No. 97-116, § 8, 95 Stat. 1616, thereby conforming it to the discretionary waiver of *exclusion* under Section 212(*i*) of the Act, 8 U.S.C. 1182(*i*), based on fraud or misrepresentation. See pages 19-20, *supra*.

When the INA was revised in 1990, Section 241(f) was repealed and replaced by Section 241(a)(1)(H) of the INA, 8 U.S.C. 1251(a)(1)(H). Immigration Act of 1990, Pub. L. No. 101-649, § 602(a) and (b)(1), 104 Stat. 5079, 5081. The revised version of the provision does not vary in relevant respects from the measure Congress enacted in 1981 to eliminate confusion and promote uniform administration by the Attorney General, and it likewise contains no limitations on the Attorney General's exercise of her discretion to grant or deny a waiver to eligible aliens.

Thus, the legislative evolution of Section 241(a)(1)(H) strongly reinforces the plain import of the statutory text as conferring broad discretion on the Attorney General.

B. In Exercising Discretion Under Section 241(a)(1)(H), The Board Of Immigration Appeals Has Drawn On Principles Developed Under Other Discretionary Waiver Provisions In The Act

In implementing the broad authority vested in the Attorney General by Section 241(a)(1)(H), the BIA has followed an approach similar to the one it takes under other sections of the INA that provide for a discretionary waiver of deportation. See Pet. App. 10a. The Board's practice calls for "a balancing of the alien's undesirability as a permanent resident [against] the social and humane considerations present to determine whether according him such relief is in the best interest of this country." Pet. App. 10a (citing *In re Marin*, 16 I. & N. Dec. 581 (BIA

1978) (discussing discretionary waiver of deportation under INA § 212(c), 8 U.S.C. 1182(c)). In this case, the BIA did not treat respondent's fraud in entering the United States in 1978 as an adverse factor in the balance of positive and negative considerations. Pet. App. 10a. But it did treat as adverse factors respondent's other "acts of immigration fraud before and after his 1978 entry into the United States," including participation in his wife's illegal immigration, two sham divorces, an intervening remarriage under a false name, and his "apparent lack of candor during the deportation hearing regarding his knowledge of the significance of his fraud." *Ibid.* The BIA concluded that this "pattern of violating this country's immigration laws through fraud" outweighed respondent's positive equities. *Id.* at 10a-11a.

The BIA's identification of the factors it would weigh in this case was consistent with its practice in similar cases over the years. Under the unqualified language of Section 241(a)(1)(H) and its predecessor, the Attorney General would be fully justified in considering (along with other positive and negative factors) the nature and gravity of the initial fraud or misrepresentation at the time of entry, which renders the alien deportable in the first place and is the subject of the waiver. See *Rodriguez-Barajas* v. *INS*, 992 F.2d 94, 97 (7th Cir. 1993). But the BIA has to date adopted a more lenient policy. The BIA has concluded that the fraud or misrepresentation at the time of the alien's entry will not be included in the otherwise comprehensive balancing of factors it deems relevant to the waiver determination. The BIA has not, however, chosen to extend that leniency to any other fraud or misrepresentation, whether occurring before or after the alien's initial entry.

The BIA based its approach to discretionary waivers of deportation under the 1981 amendments on its pre-1981 practice with regard to discretionary waivers of exclusion under the parallel provision in Section 212(*i*) of the Act.[12] Section 212(*i*) permits the Attorney General to waive exclusion in circumstances similar to those required for a waiver of deportation under current Section 241(a)(1)(H). In 1979, the Attorney General, acting through the Commissioner of INS, concluded that, in determining whether to grant a discretionary waiver of exclusion under Section 212(*i*), the initial fraud that renders an alien excludable "is the action for which [the alien] seek[s] to be forgiven and should not be held as an adverse factor." *In re Alonzo*, 17 I. & N. Dec. 292, 294 (1979); see also *In re Da Silva*, 17 I. & N. Dec. 288, 290 (1979) ("While the initial fraud is obviously adverse, this is the action for which [the alien] asks to be forgiven.").[13] At the same time, the INS

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[12] As pointed out above (see pages 19-20, *supra*), a waiver of exclusion under what is now Section 212(*i*) has been committed to the discretion of the Attorney General since 1957, long before the waiver of deportation under what is now Section 241(a)(1)(H) was made discretionary in 1981.

[13] At that time, Section 212(*i*) provided:

> Any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, may be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying

Commissioner made clear that other fraudulent acts or misrepresentations by the alien would not be ignored when making a discretionary waiver determination. See *In re Da Silva*, 17 I. & N. Dec. at 290 (indicating that the alien's alleged misrepresentation regarding his wife's pregnancy could have been properly considered as an adverse factor, "evidenc[ing] a continued pattern of fraud," if it had been left unexplained, but concluding that the alien's statement was not adverse in light of satisfactory innocent explanation for it).

When the deportation-waiver provision was transformed into a similarly discretionary measure in 1981, the BIA decided that it would follow the *Alonzo* approach with regard to waivers of deportation. See, *e.g.*, *In re Delmundo*, File A26 717 178 (BIA July 21, 1993), slip op. 3, rev'd and remanded, 43 F.3d 436 (9th Cir. 1994); see also *In re Braun-Bernal*, File A34 574 591 (BIA Oct. 9, 1991), slip op. 5-6, rev'd, 992 F.2d 1016 (9th Cir. 1993); *In re Casem*, File A38 467 077 (BIA Oct. 25, 1991), slip op. 4, rev'd and remanded, 8 F.3d 700 (9th Cir. 1993).

Thus, the BIA drew on long-standing practice under similarly discretionary waiver provisions in choosing under Section 241(a)(1)(H) to engage in a general "balancing of the alien's undesirability as a permanent resident [against] the social and humane considerations present" (Pet. App. 10a, citing *In re Marin*, *supra*) and eliminating from that balance only

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or reapplying for a visa and for admission to the United States.

8 U.S.C. 1182(*i*) (1988). The current version of Section 212(*i*) is set forth at App., *infra*, 4a.

the fraud or misrepresentation committed by the alien as part of his or her initial entry.

C. The Board's General Approach And Its Decision In This Case Are Well Within The Attorney General's Broad Discretion

The decision by the Attorney General or her delegate not to grant a waiver of deportation under Section 241(a)(1)(H), like other denials of discretionary relief in administrative deportation proceedings, may be reviewed by a court of appeals under 8 U.S.C. 1105a only for abuse of discretion. *Foti* v. *INS*, 375 U.S. at 228-229; *INS* v. *Doherty*, 502 U.S. at 323-324; *id.* at 330 (Scalia, J., concurring in the judgment in part and dissenting in part); see also Resp. C.A. Br. 2, 3, 6. The BIA plainly did not abuse its discretion in denying the application for a waiver of deportation in this case. Contrary to the Ninth Circuit's view, the BIA was not required to ignore respondent's pattern of violating the Nation's immigration laws on the ground that it was a mere "extension" of his fraudulent entry. See Pet. App. 2a-3a. The court of appeals had no authority to broaden the circumstances in which the Attorney General has determined that a waiver of deportation is appropriate.

1. In similar circumstances in the past, this Court has emphasized the substantial deference due the Attorney General's interpretation and administration of the INA. In *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam), the Court was faced with two interpretations of the "extreme hardship" showing that must be made by an alien in order to be eligible for suspension of deportation under Section 244 of the Act, 8 U.S.C. 1254. The BIA's narrow interpretation required a showing beyond economic detriment and loss of educational opportunity to the alien's children.

The Ninth Circuit adopted a more expansive interpretation (based on its view that the Act should be liberally construed), under which those considerations would have constituted a prima facie showing of eligibility. 450 U.S. at 142-143. This Court reversed the Ninth Circuit's decision, emphasizing that the court of appeals "fundamentally" erred because it "improvidently encroached on the authority which the Act confers on the Attorney General and his delegates." *Id.* at 144. The Court noted that the statutory terms "extreme hardship" were not self-explanatory and that the Act commits their definition in the first instance to the Attorney General. The Court accordingly held that the Attorney General's reasonable interpretation "should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *Ibid.* Rejecting the Ninth Circuit's attempt to broaden the Board's approach, the Court stressed that "[t]he Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so." *Id.* at 145.

It follows *a fortiori* from *Wang* that the Court should reject the Ninth Circuit's attempt to broaden the Board's already lenient treatment of initial-entry fraud when deciding whether to grant a waiver of deportation under Section 241(a)(1)(H). For what is at issue here is not the Attorney General's interpretation of a provision of the INA itself, as in *Wang*, but her identification and weighing of the factors she deems relevant in the exercise of authority that is committed to her discretion. See *Jay* v. *Boyd*, 351 U.S. at 353-354. A reviewing court may not substitute its judgment for that of the Attorney General with respect to what factors should be deemed relevant (and what weight to attach to those factors) in the exercise of her discretion under Section 241(a)(1)(H). Compare *United States* v. *Alaska*, 503 U.S. at 585 ("the Secretary has the discretion to identify relevant considerations for issuing or denying a permit") (citing *Jay* v. *Boyd*, 351 U.S. at 353-354).

2. Other courts of appeals have properly adhered to these principles in reviewing the Attorney General's exercise of her discretion to deny a waiver of deportation. In *Rodriguez-Barajas* v. *INS*, 992 F.2d 94 (1993), the Seventh Circuit correctly recognized that the Attorney General is under no compulsion to disregard the nature and severity even of an alien's initial-entry fraud in considering whether to grant a waiver of deportation under then-Section 241(f) (now Section 241(a)(1)(H)). 992 F.2d at 97. Rather, the Seventh Circuit continued, any limitations the Attorney General may observe concerning what misconduct by an alien will be considered in making waiver determinations under Section 241(a)(1)(H) arise from her exercise of discretion, and not from any requirement of the Act. See *id.* at 97. That conclusion followed, in the court's view, from the fundamental rule of deference to a reasonable exercise of discretion under the INA by the Attorney General:

> Discretion is not compulsion. The Attorney General has a choice to make, and courts review discretionary choices under the immigration laws with great deference. E.g., *INS v. Elias-Zacarias*, [502 U.S. 478, 485] (1992); *INS v. Jong Ha Wang*, 450 U.S. 139, 144-45 (1981); *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265 (7th Cir. 1985). * * * [T]he Attorney General exercises a

> delegated power. What sort of standard to use (strict versus lenient) and how to apply it to individual aliens are in her hands. The judicial role lies in policing the boundaries of the statutory delegation and in assuring that discretion within the scope of that delegation is exercised in a reasoned way.

Id. at 96 (parallel citations omitted).

Similarly, in *Liwanag* v. *INS*, 872 F.2d 685 (1989), the Fifth Circuit found no abuse of discretion where the BIA weighed as adverse factors several misrepresentations by the alien, including undertaking a second marriage to his wife, filing an immigrant visa petition on her behalf, and lying to an INS officer about their marriage. The court accorded deference to the BIA's treatment of those acts as separate from the alien's claim at the time of his initial entry that he was not married. *Id.* at 687-688.

Initially, the Ninth Circuit likewise accorded appropriate deference to the Attorney General's exercise of her discretion in identifying and weighing what she deems to be relevant acts of misconduct by aliens. In *Hernandez-Robledo* v. *INS*, 777 F.2d 536, 541 (9th Cir. 1985), the court recognized that the BIA had "noted the 'serious incident' of [the alien's] misrepresentation that he was married * * * to obtain a visa," and the court approved the BIA's citation of that factor, observing that it was "a discretionary consideration since section 241(f)(1) may serve to forgive this ground as one for deportation." In *Start* v. *INS*, *supra*, the Ninth Circuit noted the INS's concession that the alien's initial-entry fraud should not be deemed an adverse factor when determining whether to exercise discretion to grant a waiver, but

it approved the BIA's consideration of other acts of fraud and misrepresentation by the alien, including his second marriage to the wife that he had fraudulently denied at the time of entry, in order to allow her and her children to immigrate to the United States. 803 F.2d at 542. The Ninth Circuit expressly rejected the alien's argument that he had committed only "a single, continuous fraud," and held that "the BIA did not abuse its discretion by concluding that [the alien] committed multiple frauds." *Ibid.*[14]

The Ninth Circuit began to change course, however, in *Casem* v. *INS*, 8 F.3d 700 (1993). There, in reversing the BIA's decision on other grounds and remanding the case to the BIA, the court directed the BIA to note that the court had withdrawn its opinion in *Start* v. *INS*, *supra*. See 8 F.3d at 703; note 14, *supra*.[15] Then, in a concurring opinion joined in relevant part by all members of the panel (see *id.* at 703 n.1), Judge Rymer advanced a broader view of what acts of misconduct should be disregarded under

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[14] The opinion in *Start* was subsequently withdrawn after the alien's petition for review was dismissed as moot. See *Start* v. *INS*, 862 F.2d 787 (9th Cir. 1988).

[15] The *Casem* panel also called the BIA's attention to *Braun* v. *INS*, 992 F.2d 1016 (9th Cir. 1993). See 8 F.3d at 703. There, the court reversed a BIA decision that had noted that the alien not only had committed fraud in entering the country, but also had pursued an elaborate plan to have his first wife join him in the United States after he had entered the country based on the fraudulent representation that he was lawfully married to another woman who was a United States citizen. The court held that the BIA abused its discretion in considering the fraud at the time of entry and disagreed with the BIA's determination that the alien had pursued a fraudulent plan to facilitate his wife's entry. 992 F.2d at 1019-1020.

the Board's practice of not considering the alien's fraud or misrepresentation at the time of entry. The concurring opinion expressed the view that the BIA had erred when it considered, as an adverse factor, the fact that the alien, subsequent to her own entry based on a misrepresentation that she was unmarried, had submitted a visa petition on behalf of her husband that contained misrepresentations regarding the date of their marriage. See *id.* at 704. That approach, the concurrence concluded, amounted to a further consideration of the alien's own initial fraudulent entry.

In *Delmundo* v. *INS*, 43 F.3d 436 (1994), the Ninth Circuit extended still further its view of what conduct should be disregarded along with the fraud the alien committed at the time of entry. In *Delmundo*, the court held that virtually any post-entry fraud undertaken by an alien to preserve the immigrant status obtained through the alien's initial fraud is immune from consideration, so that "misrepresentations made to obtain items necessary to live and work"—in that case, a driver's license, social security card, and voter identification card—"may not be held against" the waiver applicant. *Id.* at 441.

In the instant case, the Ninth Circuit applied the same judicial extension of the initial-entry-fraud rule to prohibit the BIA from considering respondent's continuing course of serious immigration fraud—including his fraudulent application for naturalization as a United States citizen four years after his initial fraudulent entry—because, in the court's view, it "must be considered an extension of the initial fraud." Pet. App. 2a-3a.[16] Finally, in *Alquisalas* v. *INS*, 61

[16] Both in respondent's case and in *Delmundo*, the court of appeals remanded to the BIA for a reweighing of the equities,

F.3d 722 (1995), the Ninth Circuit appeared to recognize the extent to which its recent decisions had encroached upon the broad discretion accorded the Attorney General to deny a waiver under Section 241(a)(1)(H) and to decline to reopen a case for that purpose. *Id.* at 724. The court nonetheless reversed the BIA's determination under "the compulsion of" the circuit precedent of *Braun*, *Delmundo*, and *Yang*. *Id.* at 723.

3. This Court, of course, is under no similar compulsion to follow the Ninth Circuit's precedents that broaden the BIA's initial-entry-fraud rule, and it should not do so. As we have explained above (see pages 27-30, *supra*), it is for the Attorney General, not the courts, to determine which aspects of the alien's character and conduct will be considered, and which will not, in deciding whether to grant a discretionary waiver of deportation. The Board's approach in this and similar cases reflects a sound and long-standing exercise of the Attorney General's remedial discretion in that regard. It provides for a general consideration of positive and negative fac-

but limited to considering as an adverse factor, in each case, the fact that the alien apparently lied to the immigration judge in the course of the deportation proceedings under review. Pet. App. 3a-4a; *Delmundo*, 43 F.3d at 442. The court of appeals provided no explanation, however, for its implicit determination that lying to an immigration judge may be counted against an alien in balancing the equities under the court's version of the initial-entry-fraud rule, but lying to the INS or to other governmental authorities (such as motor vehicle or Social Security officials) about the same matters may not be. Moreover, in this case, the court disregarded the fact that respondent necessarily committed fraud on a court, because he could not otherwise have obtained his fraudulent divorces and remarried his wife under an assumed name.

tors bearing on the alien's suitability for continued permanent residence status, while carving out from consideration only the fraud or misrepresentation at the time of the alien's initial entry. Although the Board was not required to carve out even that exception (see pages 24, 29, *supra*), the Board could reasonably choose to do so, because it is the initial-entry fraud that is both the relevant ground for deportation and the very subject of the waiver determination under the narrowly focused terms of Section 241(a)(1)(H). In this sense, the Board could conclude, its approach follows the "pattern of the Act." Compare *Shepard* v. *NLRB*, 459 U.S. 344, 351 (1983).

By contrast, the court of appeals' open-ended extension of the initial-entry-fraud rule is inconsistent with an even-handed and reasonable application of Section 241(a)(1)(H). The court's approach places an alien who obtains his initial entry by fraud, and then commits a series of further fraudulent acts to preserve his illegally obtained status, in a better position than an alien who enters the country by lawful means, but later embarks on a similar series of fraudulent acts in an attempt to remain here. The alien who entered by fraud would, under the Ninth Circuit rule, have all of his frauds ignored in evaluating his request for a waiver of deportation under Section 241(a)(1)(H). The alien who entered lawfully, however, would have each of the frauds in the series weighed against him if he seeks discretionary relief, such as that available under Section 212(c) of the Act, 8 U.S.C. 1182(c). That cannot be the result that Congress intended in providing for a limited, discretionary waiver of deportation in certain cases of entry fraud. By contrast, the Board's rule

strikes a reasonable balance between forgiving the fraud at which Section 241(a)(1)(H) is directed, while at the same time not ignoring other serious misconduct by the alien that weighs against an award of special discretionary relief.

4. The Board did not abuse its discretion in applying its initial-entry-fraud rule in this case. The Board found that respondent "engaged in a pattern of violating this country's immigration laws through fraud." Pet. App. 10a. In accordance with the rule of *Alonzo* and *Da Silva*, the Board did not weigh as an adverse factor the fraud committed by respondent at the time of his initial entry into the United States, but reasonably weighed respondent's other acts of fraud against him. *Id.* at 10a-11a.

In the court of appeals, respondent himself recognized that his fraudulent naturalization application was distinct from his initial-entry fraud and could be properly considered as an adverse factor for Section 241(a)(1)(H) purposes. See Resp. C.A. Br. 4 ("The one and only adverse factor is the fraud associated with the naturalization interview."). Respondent acknowledged that "[w]hat is required" in his case "is a balancing of his fraudulent misrepresentation at the naturalization interview against the social and humane considerations." *Id.* at 6. There accordingly was no basis for the court of appeals to treat respondent's naturalization fraud as a mere extension of his initial-entry fraud. Pet. App. 2a-3a.

Moreover, to require the Attorney General to ignore respondent's fraudulent naturalization application would not only interfere with the Attorney General's exercise of her statutory discretion, but also would lead to the forgiveness of a fraud that is more significant than the initial-entry fraud at which

Section 241(a)(1)(H) is directed. Fraud in an application for naturalization as a United States citizen normally is a sufficient basis for revocation of citizenship, see 8 U.S.C. 1451; *Kungys* v. *United States*, 485 U.S. 759 (1988), which "[i]n its consequences * * * is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance." *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943). Yet, under the court of appeals' approach, respondent's filing of a fraudulent naturalization application in 1982 in an attempt to obtain full citizenship would be treated as if it were subsumed by his unlawful entry by fraud in 1978. The Attorney General's approach reasonably refuses to treat fraud in obtaining the greater benefit as a mere "extension" of the fraud in obtaining the lesser.[17]

---

[17] The court of appeals' decision in this case could potentially affect the ability of the Attorney General to consider respondent's pattern of post-entry fraud, including his fraudulent naturalization petition, for purposes of acting on the naturalization petition itself. Under Section 340 of the INA, 8 U.S.C. 1451, the Attorney General has exclusive jurisdiction to grant petitions for naturalization. The BIA has previously decided, in another context, that a waiver of deportation under Section 241(a)(1)(H) also "waive[s] the underlying fraud," effectively erasing the initial illegality and causing the recipient of the waiver to be treated as a lawful permanent resident from the time of entry. *In re Sosa-Hernandez*, BIA Interim Dec. No. 3214 (Nov. 12, 1993); *In re Manchisi*, 12 I. & N. Dec. 132 (BIA 1967). We believe that the Attorney General should be able to conclude, in a case like respondent's, that an alien to whom she has been forced to grant a waiver of deportation under a judicial extension of the initial-entry-fraud rule nonetheless has not displayed the "good moral character" required for naturalization as a citizen. 8 U.S.C. 1427(a); see also 8 U.S.C. 1427(d) and (e). But if the Attorney General may rely on evidence so central to an alien's moral character in denying naturalization, it is difficult to see why she may not consider the same evidence in deciding whether to allow the same alien to remain in the country.

The Board's consideration of respondent's participation in his wife's fraudulent entry as an adverse factor when making its Section 241(a)(1)(H) decision also did not constitute an abuse of discretion. Respondent's participation in a fraudulent divorce in Taiwan and his provision of $60,000 to his wife for her to buy a false United States citizen identity enabled his wife to enter the United States unlawfully without detection. His wife thereby obtained the substantial benefits that arise out of residence in this country and her status was not dependent on respondent's own subsequent fraudulent entry. The fact that respondent thereafter obtained his own unlawful entry into this country based on a remarriage to his wife under her false American identity does not diminish the seriousness of the independent and separate fraud that he and his wife already had committed to facilitate her entry. The Board's treatment of respondent's participation in the earlier fraud as separate from his own fraud in connection with his own entry is entirely reasonable and consistent with the Board's view of the scope and rationale of its initial-entry-fraud rule.

The Ninth Circuit's radical extension of the Board's rule, by contrast, confers a derivative immunity on an alien against consideration of all subsequent acts of fraud or misrepresentation that, in the court's view, are necessary to maintain a false

identity in the United States, as well as acts of fraud and misrepresentation that preceded the alien's own entry. The result of the Ninth Circuit's decisions is to transform Section 241(a)(1)(H) from a provision designed to "waive relatively minor grounds for deportation" into the very sort of "charter of amnesty" that Congress sought to eliminate when it amended that provision in 1981 and committed the granting of relief to the judgment and discretion of the Attorney General. See H.R. Rep. No. 264, *supra*, at 25.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 212 of the Immigration and Nationality Act (INA), 8 U.S.C. 1182, provides in pertinent part:

§ 1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

* * * * *

(5) Labor certification and qualifications for certain immigrants

(A) Labor certification

(i) In general

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is excludable, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the

time of application for a visa and admission to the Untied States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

* * * * *

(6) Illegal entrants and immigration violators

* * * * *

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

* * * * *

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—

(I) Who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, * * *

* * * * *

is excludable.

* * * * *

(*i*) Admission of immigrant excludable for fraud or willful misrepresentation of material fact

The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C) of this section—

(1) in the case of an immigrant who is the spouse, parent, or son or daughter of a United States citizen or of an immigrant lawfully admitted for permanent residence, or

(2) if the fraud or misrepresentation occurred at least 10 years before the date of the immigrant's application for a visa, entry, or adjustment of status and it is established to the satisfaction of the Attorney General that the admission to the United States of such immigrant would not be contrary to the national welfare, safety, or security of the United States.

* * * * *

2. Section 241(a)(1) of the INA, 8 U.S.C. 1251(a)(1), provides in relevant part:

§ 1251. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:

(1) Excludable at time of entry or of adjustment of status or violates status

(A) Excludable aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable.

* * * * *

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D) [relating to certain aliens who assisted in Nazi persecution or engaged in genocide]) who—

(i) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title [relating to possession of valid labor certifications and immigrant visas, respectively] which were a direct result of that fraud or misrepresentation.

A waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive deportation based on the grounds of inadmissibility at entry directly resulting from such fraud or misrepresentation.

* * * * *

3. Former Sections 212(a)(14), (19) and (20) of the INA, 8 U.S.C. 1182(a)(14), (19) and (20) (1988), which were the predecessors to Sections 212(a)(5), (6)(C) and (7)(A), provided:

§ 1182. Excludable aliens

(a) General classes

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title;

* * * * *

(19) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure or has procured, a visa, other documentation, or entry into the United States or other benefit provided under this chapter;

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the

time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title;

* * * * *

4. Former Sections 241(a)(1) and (f) of the INA, 8 U.S.C. 1251(a)(1) and (f) (1988), which were the predecessors to Sections 241(a)(1)(A) and (H), provided, in relevant part:

§ 1251. Deportable aliens

(a) General classes

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

(f) Discretion of Attorney General to waive deportation for fraudulent entry in specified cases

(1)(A) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in subsection (a)(19) of this section [relating to certain aliens who assisted in Nazi persecution or engaged in genocide]) who—

(i) is the spouse, parent, or child of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (14), (20), and (21) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(B) A waiver of deportation for fraud or misrepresentation granted under subparagraph (A) shall also operate to waive deportation based

on the grounds of inadmissibility at entry described under subparagraph (A)(ii) directly resulting from such fraud or misrepresentation.

* * * * *

(1)

Supreme Court, U.S.
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No. 95-938

In The

Supreme Court of the United States

October Term, 1995

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

YUEH-SHAIO YANG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Attorney General, when deciding whether to grant the family waiver of deportation under § 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(H), may take into account actions that the alien took as part of the same scheme before and after his fraudulent entry into the United States.

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STATEMENT OF FACTS

A. Introduction

Respondent Yueh-Shaio Yang has resided in the United States for 18 years and is 76 years old. Mr. Yang is before the Court because he misrepresented his wife's identity and place of birth to immigration authorities in order to immigrate to the United States. After immigrating in 1978, Mr. Yang started a business and has otherwise led an exemplary and productive life in the United States. One of his daughters is a United States citizen. In spite of his equities, the Board of Immigration Appeals denied an humanitarian family waiver under § 241(a)(1)(H) of the Immigration and Nationality Act, and petitioner Immigration and Naturalization Service challenges the Circuit Court's decision remanding the case for re-evaluation.

B. Relevant Evidence Adduced at the Deportation Hearing

Mr. Yang is a native of mainland China and a citizen of the Republic of China on Taiwan.[1] Mr. Yang and his wife were married in mainland China, but fled to Taiwan at the conclusion of World War II as mainland China was falling under communist control. While living in Taiwan, Mr. Yang worked in the communications field for Civil Air Transport, a private company run by General Claire Chennault,[2] which worked both with the

---

1. Petitioner's brief states that Mr. Yang is a native of the People's Republic of China. Brief for Petitioner, p. 2. The Board of Immigration Appeals stated that Mr. Yang is a native of Taiwan. Pet. App. 6a. The Order to Show Cause merely stated that Mr. Yang was born in China.

2. The transcript uses the phonetic spelling of "Sharnot." TR 102. However, Mr. Yang was referring to General Chennault of Flying Tigers fame. The transcript also shows his position with General Chennault as that of a clerk. TR 102. However "clerk" in Chinese is a more expansive term that covers all staff employees who are not of managerial rank.

government of Taiwan and the United States government. He fled to the United States during the exodus of the late 1970's when the United States broke off diplomatic relations with the Republic of China. TR 122.

Mr. Yang immigrated to the United States through his wife, who originally came to the United States in 1977 as a visitor. While she was here, she met an individual who advised her that she could immigrate to the United States by investing $60,000 if she were unmarried.[3] Mrs. Yang returned to Taiwan to obtain the money and divorce Mr. Yang;[4] she then traveled back to the United States.

After she paid the money, Mrs. Yang appeared at the Immigration and Naturalization Service offices in San Francisco, California for an interview by an INS officer. A week later, she received a United States passport under the assumed name of Mary Wong. Admin Rec. TR 37-38. With this passport identifying her as a U.S. citizen, Mrs. Yang returned to Taiwan and remarried her husband under this new identity. She then filed a visa petition on Mr. Yang's behalf. Pursuant to this petition, he received an immigrant visa and immigrated to the United States on August 1, 1978 as the spouse of Mary Wong, a U.S. citizen.

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3. At that time, persons could immigrate upon the investment of at least $40,000 in a business. 8 C.F.R. § 212.8(b) (1978). However, visas were no longer immediately available in this category by the end of 1977 and were completely exhausted by the end of May 1978; the State Department had advised that due to changes in the law, there would be no further allocation of visas to this category. *See* Pet. App. 15a-16a; 1981 U.S. Code Cong. Admin. News 2577, 2605.

4. The evidence in the record shows that Mr. Yang thought the money was for the purpose of obtaining an otherwise legal immigrant visa based on business investment. He acknowledged, however, that his use of his wife's assumed identity and her marital status was a deception. TR 75.

In 1982, Mr. Yang applied for naturalization. The information provided on his application repeated the information he had provided previously when he immigrated to the United States. Although Mr. Yang was interviewed for his naturalization, his application was never approved.

In 1992, approximately ten years after Mr. Yang applied for naturalization and fourteen years after he immigrated, the INS issued deportation charges against Mr. Yang and his wife. The original deportation charges against Mr. Yang alleged that he entered as an immigrant who was seeking to work but did not have the required labor certification and that he did not possess a valid visa. Joint Appendix 1-6. At a preliminary hearing, Mr. Yang admitted the charges. On the day of the deportation trial, the INS lodged an additional charge that Mr. Yang was deportable as an alien who was excludable at the time of entry on the ground that he had procured entry by misrepresenting a material fact. Admin. Rec. TR 19. Mr. Yang admitted that new charge as well and applied for relief from deportation under the § 241(a)(1)(H) family waiver provision on the ground that he is the father of a United States citizen daughter.

At the deportation hearing, Mr. Yang submitted evidence showing substantial equities warranting a favorable exercise of discretion, including the fact that four of his eight children live in the United States and that his advanced age and health problems, together with the many years he has lived in the United States, would make it difficult for Mr. Yang to return to Taiwan.

The immigration judge found that Mr. Yang was eligible for the waiver. However, the judge denied the application. Mr. Yang appealed to the Board of Immigration Appeals, but the Board agreed with the immigration judge and dismissed the appeal. However, the Ninth Circuit Court of Appeals granted Mr. Yang's petition for review on the ground that both the immigration judge

and the Board had considered impermissible factors in denying the waiver application; the case was remanded for a re-weighing of the equities.

Since his admission in 1978, Mr. Yang has never been arrested, cited, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance. Joint Appendix 10. Mr. Yang has been a productive resident of this country. He has significant ties to this country. He has owned his own company and invested substantial amounts of money in developing real estate here. Admin. Rec. TR 78, Pet. App. 11a. He has regularly paid his income taxes and contributed to charitable causes. Admin. Rec. TR 85,86.

C. Evidence Relied Upon By The Immigration Judge

Although the immigration judge noted the positive equities in Mr. Yang's case, he also believed that Mr. Yang had not been candid about his financial status early in the hearing. TR 15. The immigration judge further found that Mr. Yang's equities were based "almost solely"[5] on his relationship to children who had immigrated illegally and who had committed acts of "less than sterling nature." *Id.* The immigration judge specifically referred to attempted immigration fraud committed by two of his children, then went on to conclude that Mr. Yang did not warrant a favorable exercise of discretion, due in large part to the acts of his family. TR 15, 16.

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5. The government misquotes this phrase as "also solely." Pet. App. 24a. The "almost" in the immigration judge's decision likely refers to Mr. Yang's daughter, Lilly Liu, who immigrated legally and is now a naturalized U.S. citizen. There is no other reference to Ms. Liu in the immigration judge's decision.

D. Evidence Relied Upon By The Board Of Immigration Appeals

In dismissing Mr. Yang's appeal, the Board identified four adverse factors: (1) his divorce and remarriage before immigrating to the United States; (2) his application for naturalization in which he perpetuated the fraud of his wife's identity as a U.S. citizen; (3) his second divorce and remarriage, "in order to attempt to rectify his wife's initial fraud and allow her to resume her true identity."; and (4) his lack of candor regarding his knowledge of the significance of his fraud.[6] Pet. App. 10a.

E. Evidence Relied Upon By The Ninth Circuit

The Court of Appeals found that Mr. Yang's participation in his wife's fraudulent entry, as well as their divorces and remarriages and the statements made on his naturalization application, were all component parts of the same fraud.[7] As such, they could not be considered by the immigration judge. Pet. App. 2a-3a. However, the Court of Appeals found that Mr. Yang's lack of candor at the hearing regarding his finances was properly considered. The case was remanded for a re-weighing of the equities, with the questionable testimony constituting an adverse factor.

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6. This factor appears to be a misstatement by the Board. The immigration judge found that Mr. Yang lacked candor in his testimony about his finances. TR 15. The credibility finding referred to by the Board actually pertains to Mrs. Yang. See TR 11.

7. Although Mr. Yang's "divorces and remarriages" are referred to in the plural, the second fraud and remarriage was for the purpose of allowing Mr. Yang and his wife to resume their true identity as a married couple. TR 40-41. The immigration judge made no adverse finding regarding the second divorce.

SUMMARY OF ARGUMENT

The history and plain language of the family waiver of § 241(a)(1)(H), as well as prior decisions of this Court, require a finding that the Board of Immigration Appeals' consideration of respondent's actions before and after his fraudulent entry into the United States was improper.

When the predecessor to § 241(a)(1)(H) was enacted in 1948, its humanitarian purpose was to forgive acts of immigration fraud or misrepresentation in the interest of family unity. Nothing in the ensuing years has diminished those aims. Although the provision was amended in 1981, the heart of the waiver continues to offer relief to those who used fraud or misrepresentation in their immigration who are "otherwise admissible." Read in conjunction with cases leading up to the 1981 amendments and the retention of the "otherwise admissible" language, the new version of the waiver actually broadened its scope. The Immigration and Naturalization Service could no longer elude the waiver by lodging separate statutory allegations that actually flowed from the fraudulent act. But most significantly for this case, Congress continued to use the "otherwise admissible" language. This makes clear that Congress intended to leave intact a statutory scheme that forbade the consideration of the fraud that gave rise to deportability in determining whether to grant the waiver. Contrary to the government's assertions, the "initial fraud" concept is required by statute and is not a revocable policy adopted by the Board of Immigration Appeals as a matter of leniency.

The initial fraud concept is thus of statutory creation, making it clear that the original fraud is not to be weighed in the waiver decision. The question then becomes whether actions that are all part of the initial fraudulent scheme can be disaggregated in a manner that they should not be shielded from consideration

by the initial fraud concept. The context of the facts of this case make the answer evident. Any fraud has several components; if the government's approach were allowed, the statute would be rendered meaningless. Thus, the planning, preparation, implementation, and continuation of the fraud must all be deemed part of and protected by the initial fraud concept. This must be especially so when the fraud involves a change in identity or persona.

Thus, the case should be remanded to the agency for a proper weighing of equities and misdeeds. Respondent concedes that if he was not candid about his financial circumstances before the immigration judge, that action can be properly weighed since it had nothing to do with his initial immigration fraud.

ARGUMENT

I.

THE HISTORICAL DEVELOPMENT OF THE § 241(a)(1)(H) FAMILY WAIVER DOES NOT SUPPORT THE GOVERNMENT'S INTERPRETATION OF THE STATUTE; CONGRESS DID NOT GRANT THE ATTORNEY GENERAL BROAD DISCRETION TO DETERMINE WHICH CASES OF INITIAL-FRAUD ENTRY MERIT A WAIVER OF DEPORTATION.

A. The First Appearance Of The Family Waiver And The "Initial Fraud" Construction Of "Otherwise Admissible"

The legislative history of the family waiver of § 241(a)(l)(H), or § 241 (f) as it appeared in the statute until 1990, begins with the enactment of the Displaced Persons Act of 1948, 62 Stat. 1009. This Act provided for the admission to the United States of thousands of war refugees, many from countries that

had fallen behind the Iron Curtain. Some of these refugees misrepresented their nationality or homeland while in Europe to avoid being repatriated to a communist country. In so doing, however, they fell afoul of § 10 of the Act, which provided that persons making willful misrepresentations for the purpose of gaining admission "shall thereafter not be admissible into the United States. "The plight of these refugees, who were excluded from the United States for misrepresentations that were generally felt to be justifiable, inspired recurring proposals for statutory reform. When the Act was revised and codified in 1952, the House Committee recommended adding a provision to save such refugees from deportation when they had misrepresented their nationality or homeland only to avoid repatriation and persecution. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 128 (1952). The Conference Committee deleted the provision, but announced its sympathy with the refugees in the following terms:

> It is also the opinion of the conferees that the sections of the bill which provide for the exclusion of aliens who obtained travel documents by fraud or by willfully misrepresenting a material fact, should not serve to exclude or to deport certain bona fide refugees who in fear of being forcibly repatriated to their former homelands misrepresented their place of birth when applying for a visa and such misrepresentation did not have as its basis the desire to evade the quota provisions of the law or an investigation in the place of their former residence.

H.R. Rep. No. 2096, 82d Cong., 2d Sess. 128 (1952).

The Immigration and Naturalization Service and the Attorney General did not construe the statute as the Conference Committee had recommended, however, believing that the explicit statutory language did not allow for an exemption for justifiable misrepresentations. Refugees who misrepresented their place of origin were always found to have concealed a material fact, since the misrepresentation hindered an investigation of their background. *See Matter of B- and P-*, 2 I. & N. Dec. 638 (1947); H.R. Rep. No. 1199, 85th Cong., 1st Sess. 10 (1957).

The misrepresentation section was not the only provision of the 1952 legislation that was widely thought to be unnecessarily harsh and restrictive, and in 1957 Congress passed legislation alleviating in many respects the stricter provisions of the earlier legislation. The purpose of the 1957 Act is perfectly clear from its terms, as well as from the relevant House and Senate Committee Reports. The most important provisions of the Act provided for special nonquota status for the adopted children or illegitimate children of immigrant parents, and for orphans who have been or are to be adopted by United States citizens. Other important provisions allowed the Attorney General to waive certain grounds for exclusion or deportation, including affliction with tuberculosis or conviction of a crime involving moral turpitude, on behalf of aliens who have close relatives of United States citizens or aliens lawfully admitted for permanent residence. H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7 (1957). *See also*, S. Rep. No. 1057, 85th Cong., 1st Sess. (1957). This Court recognized that the "intent of the Act was plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country." *INS v. Errico*, 385 U.S. 214, 220 (1966).

In this context it is not surprising that Congress also granted relief to aliens facing exclusion or deportation because they had gained entry through misrepresentation. Section 7 of the 1957 Act, which later evolved into § 241(f) then § 241(a)(1)(H), provided, in pertinent part, that:

> The provisions of section 241 . . . relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien *otherwise admissible* at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954 ... and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: Provided, that such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere. . . .

(Emphasis added).

This Court was presented with the statutory construction question over the phrase "otherwise admissible" in *INS v. Errico*, 385 U.S. 214 (1966). The Court noted that the section waived deportation for two classes of aliens who entered by fraud or misrepresentation. First, an alien who was the spouse, parent, or a child of a U.S. citizen was saved from deportation for the fraud if he or she was "otherwise admissible at the time of entry." Second, an alien who entered during the postwar period and misrepresented his or her nationality, place of birth, identity, or residence was saved from deportation if he or she was "otherwise admissible at the time of entry" and could establish that the misrepresentation was predicated on fear of persecution and "was not committed for the purpose of evading the quota restrictions." This Court concluded,

> Congress must have felt that aliens who evaded quota restrictions by fraud would be "otherwise admissible at the time of entry" or it would not have found it necessary to provide further that, in the case of an alien not possessing a close familial relationship to a United States citizen or lawful permanent resident, the fraud must not be for the purpose of evading quota restrictions.

Id. at 222-23. Thus, the Court held that it was improper to deny relief to statutorily-eligible aliens who had close U.S. citizen relatives if they had not complied with quota requirements. *Id.* at 223. This marked the recognition by the Court that as long as the alien had a close statutory relative, the relief should be granted. The initial fraudulent action to evade immigration requirements must be set aside in determining whether the person was "otherwise admissible."

B. Expansions Under The 1981 Amendments

In response to controversies that arose over the application of § 241(f) after the *Errico* decision, Congress amended the provision in 1981. In support of its contention that Congress intended to grant the Attorney General broad discretion to determine which cases of fraud merit a waiver of deportation, the government cites language in the 1981 legislative history that asserted that § 241(f) had become a "major source of controversy" and that "litigants ha[d] sought to expand § 241(f) into a charter of amnesty, waiving all restrictions for those who had entered the United States through fraud." (Brief for the Petitioner at 20). In seeming support of this contention, in 1975, this Court observed that decisions of the lower courts under § 241(f) might be "summarized in the language of Macduff: 'Confusion now hath made his masterpiece.' " *Reid v. INS*, 420 U.S. 619, 628 (1975). Thus, in the government's view, the analysis is simple: In response to these concerns, Congress made § 241(f) discretionary. Since the relief is now discretionary, the Attorney General's authority over the waiver should be "unfettered." Aside from the fact that discretionary authority does not confirm unfettered decisionmaking, the problem with the government's analysis is that it ignores the judicial development of § 241 (f), what Congress actually did, and why Congress acted as it did.

In fact, the attempt to expand § 241(f) into a so-called "charter of amnesty" and the "confusion" of the lower courts had to do with claims that the relief should be extended to aliens who had entered on temporary or nonimmigrant visas or under false claims to U.S. citizenship. The type of case involved here — entry as an immigrant based on fraud — was never a source of controversy or confusion. That such immigrant cases were intended to be covered by the waiver was never disputed. In *Reid*, the Court held that an alien who accomplished entry by falsely

asserting U.S. citizenship was not eligible for § 241(f) relief, because such aliens were deportable on grounds distinct from entry based on fraud and misrepresentation (viz., entry without inspection). *Reid v. INS, supra*, at 624. The Court was also critical of lower courts that had extended § 241(f) relief to aliens entering the United States under temporary visitor permits, who acquired one of the specified familial relationships after entry, and who argued that their fraudulent intent upon entry to remain in the country permanently cloaked them with immunity from deportation even though they overstayed their visas. *Id.* at 628.

Therefore, the 1981 amendments codified *Reid* by adding language to Section 241 (f) that limited its application to those who were "in possession of an immigrant visa or equivalent document." That language was retained in 1990 when the provision was renumbered § 241(a)(1)(H). Thus, the waiver is not available to all aliens who have entered through fraud or misrepresentation. The waiver is available only to *immigrants* who have entered through fraud or misrepresentation. At the time, this conformed § 241 (f) with the exclusion waiver of § 212(i), which, until 1990, was specifically limited to the case of an "immigrant" excludable for fraud or misrepresentation who was "otherwise admissible."[8]

The 1981 amendments cleared up another problem identified in the *Reid* decision related to the scope of the waiver. In *Reid*, this Court noted: "[n]or has there been agreement among

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8. The 1990 Act amended INA § 212(i) in three ways. First, it made the waiver available to both nonimmigrant and immigrant visa applicants. Second, the new law expanded the applicable family relationships to include adult sons and daughters of U.S. citizens and residents, not just unmarried children under 21. Third, the changes made the waiver available to any alien, regardless of the existence of a family relationship, if the fraud or misrepresentation occurred at least 10 years before the alien's application for a visa, entry, or adjustment of status. Immigration Act of 1990, § 601(d)(5).

those courts which have construed § 241(f) to waive substantive grounds for deportation under § 212 other than for fraud delineated in § 212(a)(19) as to which other grounds are waived." 420 U.S. at 629. In other words, the fact that an immigrant had committed fraud in entering might give rise to a separate, non-fraud ground of exclusion or deportation, such as lack of a labor certification or valid visa. Thus, some courts refused to extend § 241 (f) relief when the INS alleged excludability for lack of a labor certification or valid visa even though those exclusion grounds flowed from the initial fraud or misrepresentation. *See, e.g., Escobar Ordonez v. INS*, 526 F.2d 969 (5th Cir. 1976); *Matter of Montemayor*, 15 I. & N. Dec. 353 (BIA 1975); *cf. Matter of Anabo*, 18 I. & N. Dec. 87 (BIA 1981). This was in spite of the fact that someone who used fraud to obtain an immigrant visa, obviously possessed an invalid immigrant visa. So the government successfully argued in some courts that a person excludable for fraud was also excludable for possession of an invalid visa, to which § 241(f) did not apply. By successfully arguing that an invalid visa or lack of labor certification charge was distinct, the government could avoid the application of § 241(f). The BIA followed this restrictive logic:

> We recognize that this construction of the statute drastically reduces the scope of section 241(f). . . . It means that there will virtually always be an alternative ground of deportability, not affected by § 241(f), in any case in which deportability can be predicated on § 212(a)(19) [fraud or misrepresentation]. In the case of an alien who entered with an immigrant visa . . . a common alternative charge would be based on § 212(a)(20) [invalid visa]. However, the [Supreme] Court's opinion in *Reid* limits the applicability of § 241(f) to a § 241(a)(1)

> charge of deportability based on . . . 212(a)(19). . . . The respondent [in this case] remains deportable under the charges based on section 212(a)(14) [lack of labor certification] and section 212(a)(20) [invalid visa].

Matter of Montemayor, 15 I. & N. Dec. 353, 356 (BIA 1975).

The 1981 amendments reversed that interpretation of Section 241 (f) and its successor § 241(a)(1)(H), by providing that the waiver is available so long as the alien "was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of § 1182(a) [formerly 212(a)(14) and 212(a)(20)] of this title [relating to possession of valid labor certifications and immigrant visas, respectively] which were a direct result of that fraud or misrepresentation." Thus, the 1981 amendments assured an expansive application of the statute insofar as its applicability to grounds of inadmissibility at entry directly resulting from the initial fraud or misrepresentation. The amendments resurrected the waiver in those jurisdictions that had allowed INS to elude § 241(f) by alleging invalid visa or lack of labor certification. Furthermore, the waiver was extended to innocent as well as to fraudulent misrepresentations.[9]

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9. David Crosland, the Acting Commissioner of INS described the 1981 amendment this way:

> The amendment makes the waiver discretionary with the Attorney General, clarifies the meaning of the term "otherwise admissible", and makes it clear that relief is available to those who have made innocent, as well as fraudulent, misrepresentations.

Immigration and Nationality Efficiency Act of 1979, Hearings on S. 1763 (Cont'd)

The 1981 amendments also expanded § 241(f) by allowing the affected alien to maintain lawful immigrant status. Prior to 1981, § 241(f) merely acted as a bar to deportation, by providing that the "section relating to deportation . . . on the ground [relating to] fraud or misrepresentation shall not apply." Petition for Writ of Certiorari at 28a. The section did not confer lawful immigrant status or citizenship status. *See, e.g., Yik Shuen Eng v. INS*, 464 F.2d 1265 (2d Cir. 1972). A person was essentially in limbo status and did not acquire lawful immigrant status unless some other relief such as registry or suspension of deportation was available. But since 1981, the provision speaks in terms of "waiving" the grounds of exclusion for those entering as immigrants. By waiving exclusion grounds, the person retains immigrant status. *Matter of Sosa-Hernandez*, 20I. & N. Dec. 758 (BIA 1993).

Thus, the 1981 amendments served to expand the waiver. Charles Gordon, the former INS General Counsel and co-counsel for the government in the *Errico* case explained:

> As General Counsel of the Immigration and Naturalization Service I was involved in much of [the controversy and] litigation [over Section 241 (f)]. It seems to me that to some extent the problem has been caused by the excessive severity of this ground of exclusion and deportation, which continues perpetually. Courts often were impelled to adopt generous interpretations of the statute, in order to promote family unity. . . .
>
> The proposed amendments include the

(Cont'd)

Before the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 36 (1979) (Statement of David Crosland, Acting Commissioner, INS).

> following elements: . . . The requirement that the beneficiary of the waiver be "otherwise admissible" is defined to eliminate the inadmissibility for visa defects and absence of a labor certification. This reasonable modification will end some of the current controversy. . . . Specific provision is made to benefit those inadmissible for innocent misrepresentations. This is certainly desirable, since it seems unjustifiable to give one guilty of intentional deception greater benefits than one whose misstatement was innocent. Indeed, an early judicial holding, thereafter adopted by the Board of Immigration Appeals, found that section 241 (f) waivers benefitted those who entered irregularly on the basis of innocent misstatements. *See In re Hon*, 289 F. Supp. 204 (S.D.N.Y. 1968); *Matter of Lim*, 13 I. & N. Dec. 169 (BIA 1969). However, this view apparently was rejected by dicta in *Reid v. INS*, 420 U.S. 619, 629-30 (1975), and now has been repudiated by a recent decision of the Board of Immigration Appeals, *Matter of Raqueno*, 17 I. & N. Dec. 10 (BIA 1979). I support the more reasonable approach mandated by the proposed amendment.

Immigration and Nationality Efficiency Act of 1979, Hearings on S. 1763 Before the Senate Committee on the Judiciary , 96th Cong., 1st Sess. 36 (1979), at 54-55 (Statement of Charles Gordon, former General Counsel, INS).

C. Further Expansion By The 1990 Amendments

When the Immigration and Nationality Act was revised in 1990 (Pub. L. No. 101-649, 104 Stat. 4978), § 241(f) was essentially renumbered as Section 241(a)(1)(H). While the revised version looks quite similar to the 1981 version of § 241(f), Congress further expanded the provision in two important respects. The pre- and post-1981 versions of § 241(f) refer to an alien who "is the spouse, parent, or *child* of a citizen" or lawful resident alien. But in today's version since 1990, the § 241(a)(1)(H) family waiver refers to an alien who "is the spouse, parent, *son, or daughter* of a citizen" or resident alien. The change from "child" to "son or daughter" represents an expansion, because under § 101(b)(1) a child is defined as a person who is unmarried and under the age of 21. A "son or daughter" on the other hand can be married and over the age of 21. The revised version extended coverage to aliens who are the adult sons and daughters of U.S. citizens and residents, not just unmarried children under 21. Thus, the waiver had a broader familial application after 1990.

The 1990 changes also expanded the range of misrepresentations resulting in excludability to coincide with the revised grounds for excludability for misrepresentation that were a part of the Immigration Marriage Fraud Amendments of 1986. *See* Gordon, *et al.*, *Immigration Law and Procedure*, § 71.04[2][a] (1996).

The parallel § 212(i) family exclusion waiver was also broadened by the 1990 amendments.[10]

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10. Under the prior version of INA § 212(i), aliens could have their excludability for fraud or misrepresentation waived only if they were (1) otherwise admissible as permanent residents, and (2) the spouse, parent or child of a U.S. citizen or permanent resident. The 1990 Act amended INA § 212(i) in three ways. First, it made the waiver available to both nonimmigrant (Cont'd)

II.

THE INITIAL FRAUD CONCEPT IS REQUIRED BY STATUTE; ITS APPLICATION IS NOT A REVOCABLE POLICY ADOPTED BY THE BIA AS A MATTER OF LENIENCY.

A major premise of the government's position in this case is defective. The government argues that:

> Under the qualified language of Section 241(a)(1)(H) and its predecessor, the Attorney General would be fully justified in considering (along with other positive and negative factors) the nature and gravity of the initial fraud or misrepresentation at the time of entry, which renders the alien deportable in the first place and is the subject of the waiver. . . . But the BIA has to date adopted a more lenient policy. The BIA has concluded that the fraud or misrepresentation at the time of the alien's entry will not be included in the otherwise comprehensive balancing of factors it deems relevant to the waiver determination.

Br. for Pet. at 24 (emphasis added). Put differently, "it is for the

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and immigrant visa applicants. Second, as with INA § 241(a)(1)(H), the new law expanded the applicable family relationships to include adult sons and daughters of U.S. citizens and residents, not just unmarried children under 21. Third, the changes made the waiver available to any alien, regardless of the existence of a family relationship, if the fraud or misrepresentation occurred at least 10 years before the alien's application for a visa, entry, or adjustment of status. Immigration Act of 1990, § 601(d)(5).

Attorney General, not the courts, to determine which aspects of the alien's character and conduct will be considered, and which will not, in deciding whether to grant a discretionary waiver of deportation." Br. for Pet. at 33. The implication is that the Attorney General directly, or through the BIA, could revoke the "lenient policy" of the initial-fraud concept. But this characterization of the initial-fraud concept is inaccurate. Congress has not left it to the Attorney General to determine whether the initial fraud should be considered. The statute requires that the initial fraud not be considered. This case involves the Attorney General's interpretation of § 241(a)(1)(H), so review must begin with the Attorney General's construction of the statute. But whatever authority the Attorney General and her delegates have to grant a waiver, they must act within the bounds of the authority delegated to them by Congress. The bounds of that authority are defined by the statute and the judiciary, not the Attorney General; the courts are the final authority on issues of statutory construction. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9, 104 S. Ct. 2778 (1984).

A. In *INS v. Errico*, This Court Already Determined That The Initial Fraud Concept Is Required By The Statute

This Court has already recognized in *INS v. Errico*, 385 U.S. 214 (1966), that the initial fraud concept is not a matter of grace or discretion on the part of the Attorney General. The initial-fraud concept is required by statute. In concluding that it was improper to deny relief to statutorily-eligible aliens who had close U.S. citizen relatives if they had not complied with quota requirements, the Court assumed that initial fraud triggers the waiver provision and that the fraud not be placed on any balancing scale after that. *Errico, supra*, at 223. The fact that the term "discretion" was added in 1981 does not change this result.

B. The Introduction Of Discretion To § 241(f) In 1981 Was Directed At The Broadened Subject Matter Of The Waiver

The family waiver was amended by Pub. L. No. 97-116, effective December 29, 1981, which modified the previously mandatory waiver of deportability for violation of INA § 241 (a)(1) [8 U.S.C. §§ 1251(a)(1)] (excludable at entry) and § 212(a)(19) [1182(a)(19)] (visa fraud or misrepresentation) and expanded its scope. The amendment gave the Board of Immigration Appeals discretionary authority over the broadened subject matter.[11] The purpose of the amendment was two-fold: one, to expand the classes of people for whom the waiver of deportability was available; and two, to enable the Board to settle troublesome legal questions regarding eligibility in an equitable manner. The amendment made relief available both for innocent and fraudulent misrepresentations and for aliens charged with excludability based on lack of a labor certification or valid immigrant visa. While the former may arguably be said to be

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11. The testimony of Richard Fairbanks, the Assistant Secretary of State for Congressional Relations, supports respondent's interpretation:

> The [1981] amendment replaces the mandatory waiver with a discretionary waiver by the Attorney General of the grounds of inadmissibility specified in section 212(a)(14), (20), and (21) [lack of labor certification and invalid visa] in the case of such an alien not subject to deportation under section 212(a)(19) [fraudulent misrepresentation] and who possesses an immigrant visa or equivalent document at the time of entry and who is otherwise admissible, except for such grounds.

Efficiency of the Immigration and Naturalization Service, Hearing Before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, House of Representatives, 96th Cong., 1st Sess, on H.R. 5087, Oct. 31, 1979, at 42-43 (Testimony of Richard Fairbanks).

merely a clarification, the latter is clearly an expansion, especially in light of how certain court interpretations had eviscerated the relief when lack of a labor certification or an immigrant visa were also alleged.

Prior to the 1981 amendment, Mr. Yang clearly had an absolute right to remain in this country, unless he lived in a jurisdiction that allowed INS to get around § 241 (f) by alleging lack of a labor certification or valid immigrant visa as a result of the fraud. The intent of Congress in amending the section and using the word "discretion" was not to enable the Board to deport an individual, like Mr. Yang, who clearly qualified for relief. Rather, the purpose of the amendment was to breathe life back into § 241 (f) family waiver by overruling the judicial opinions that had allowed INS to elude the relief by alleging lack of labor certification or invalid visa and to alter agency authority at the margins by permitting the BIA to exercise its discretion in cases in which the courts previously were required to make fine distinctions. The House Report to the 1981 amendments, states:

> The scope of the waiver and the meaning of "otherwise admissible" have become increasingly unclear. [The Amendment] clarifies that the waiver is only intended to apply to immigrants and that it is available for innocent (as well as fraudulent) misrepresentations. By doing this and making the waiver discretionary, it should obviate the need for further litigation, and promote the uniform administration of this section. H. Rep. No. 264, 97th Cong. & Ad. News 2577.

Here, however, the Board used its discretion to cut back on rights clearly afforded to Mr. Yang by the unamended statute, a result

certainly not contemplated by Congress. After all, how could "the need for litigation" be obviated or "the uniform administration" of the waiver be promoted if a class of cases that was previously indisputably within the waiver would now be subject to unfettered discretion? The government's reading would actually foster more litigation and lack of uniformity. The Yang scenario was not part of the problem prior to 1981. Fraud in obtaining immigrant status was always squarely within the parameters of the waiver.

C. The Initial-Fraud Concept Stems From The Plain Language Of The Statute

In all cases involving statutory construction, the starting point must be the language employed by Congress. *INS v. Hector*, 479 U.S. 85, 88 (1986); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). It is assumed that the legislative purpose is expressed by the ordinary meaning of the words used. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

Respondent's interpretation of the provision that the initial-fraud concept is required by the law is unavoidable from its plain language. Section 241(a)(1)(H) provides that deportation related to entry on the basis of fraud or misrepresentation, "whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien . . . who . . . is the spouse, parent, son, or daughter of a citizen . . . or permanent residen[t], and . . . was in possession of an immigrant visa or equivalent document and was otherwise admissible." The "otherwise admissible" language requires the putting aside of the initial fraud or misrepresentation before discretion is exercised, otherwise the provision would make no sense. In essence, the language means "other than the fraud or misrepresentation the person was admissible." There would be

no reason to include the "otherwise admissible" language if the initial fraud were to be part of the weighing process as the government urges. Because the statute specifically forgives the misrepresentation, the mere fact that such a misrepresentation was made cannot be weighed as a factor against granting the waiver. Nothing in the legislative history of the 1981 amendments supports the contention that Congress intended to limit the availability of the waiver. *See* H.R. Rep. No. 264, 97th Cong., 1st Sess. at 24-25, reprinted in 1981 U.S. Code Cong. & Admin. News 2577, 2593-94.[12]

Even the description of the waiver in the government's brief suggests that the initial-fraud concept is required by the statute. The government states:

> [F]raud or misrepresentation may be waived . . . if (1) the alien is the spouse, parent, or child of a citizen or lawful resident alien; (2) the alien was in possession of an immigrant visa or equivalent document (regardless of its validity . . .) . . . and (3) the alien, at the time of entry, was eligible (*aside from the fraud or misrepresentation*) for admission to the United States.

Br. for Pet. at 16 (emphasis added). In other words, one should put "aside . . . the fraud or misrepresentation" in determining whether the fraud should be waived. Similar, in the government's petition for writ of certiorari, it described the operation of the waiver in this manner:

> An alien who procured his initial entry into the United States "by fraud or [by] willfully misrepresenting a material fact," . . . is normally subject to deportation once the deception is discovered. . . . If the alien is the spouse, parent, [son or daughter] of a citizen or lawful resident alien, however, and if, at the time of entry, he would have been eligible for admission to the United States *but for* the fraud or misrepresentation, then deportation may be waived, "in the discretion of the Attorney General." 8 U.S.C. 1251(a)(1)(H).

Pet. at 10 (emphasis added). The government's use of the phrase "but for the fraud or misrepresentation" after "would have been eligible for admission" in paraphrasing § 241(a)(1)(H) is an absolutely clear acknowledgment that the fraud or misrepresentation must be put to the side in determining whether or not the person was "otherwise admissible."

In fact, the government's position in this case that the initial-

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12. The testimony of Richard Fairbanks, the Assistant Secretary of State for Congressional Relations, supports respondent's interpretation:

> The [1981] amendment replaces the mandatory waiver with a discretionary waiver by the Attorney General of the grounds of inadmissibility specified in section 212(a)(14), (20), and (21) [lack of labor certification and invalid visa] in the case of such an alien not subject to deportation under section 212(a)(19) [fraudulent misrepresentation] and who possesses an immigrant visa or equivalent document at the time of entry and *who is otherwise admissible, except for such grounds.*

Efficiency of the Immigration and Naturalization Service, Hearing Before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, House of Representatives, 96th Cong., 1st Sess, on H.R. 5087, Oct. 31, 1979, at 42-43 (Testimony of Richard Fairbanks) (emphasis added).

fraud concept is a revocable act of leniency on the part of the BIA is of recent vintage. In the past, the government has conceded the respondent's view on the initial-fraud concept. For example, while controversy existed over the scope of what was within initial fraud, the Fifth Circuit noted in a separate case that the waiver "presupposes that the petitioner has committed an act justifying deportation. In its brief, the INS concedes that the original fraudulent act should not be considered as an adverse factor in the balancing equation." *Liwanag v. INS*, 872 F.2d 685, 687 (5th Cir. 1989).

While respondent obviously disagrees with the ultimate decision of the immigration court below, even the immigration judge understood the initial-fraud concept as one that is imposed by statute, the breadth of which is a matter of statutory construction. Pet. App. at 14a-15a.

To support its argument that the initial-fraud rule is not required by statute, the government also relies on two administrative decisions relating to a separate, but analogous, exclusion waiver: § 212(i). Br. for Pet. at 25. But nothing in either decision supports the government's interpretation. *Matter of Alonzo*, 17 I. & N. Dec. 292 (Comm'r 1979), and *Matter of Da Silva*, 17 I. & N. Dec. 288 (Comm'r 1979), were both decided by the Commissioner of the Immigration and Naturalization Service. Faced with "otherwise admissible" language in § 212(i), in *Alonzo*, the Commissioner concluded: "Obtaining visas by fraud and misrepresentation shows disrespect for the law, but this is the action for which they seek to be forgiven and should not be held as an adverse factor." *Alonzo* at 294. Similarly, in *Da Silva*, the Commissioner assumed that the initial fraud should not be considered: "While the initial fraud is obviously adverse, this is the action for which he asks to be forgiven." *Da Silva* at 290. Nothing in either *Alonzo* or *Da Silva* indicates that the initial-fraud concept was being

established by the Commissioner as a matter of revocable leniency. Rather, the decisions demonstrate a rather proper interpretation of the § 212(i) family exclusion waiver that initial fraud cannot be considered due to the wording of the provision.

In short, the government ignores the plain language of the statute and misconstrues the structure of the Immigration and Nationality Act, much as it did in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In Cardoza-Fonseca, the BIA somehow attempted to equate the standard of proof for asylum ("well-founded fear of persecution") with that of withholding of deportation ("clear probability") found in two entirely different parts of the Act and enacted under two entirely different circumstances. *Id.* at 430. The Court rejected that interpretation, because the Attorney General "ignore[d] the structure of the Act" and "misconstrue[d] the federal courts' role in reviewing an agency's statutory construction." *Id.* at 443.

D. Given The Stakes, Any Doubt As To The Proper Construction Of The Statute Should Be Resolved In The Alien's Favor.

Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed:

> We resolve the doubts in favor of [the alien] because deportation is a drastic measure and at times are equivalent of banishment or exile, *Delgadillo v. Carmichael*, 332 U.S. 388 [(1947)]. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the

> alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 [(1948)].

The Court has already recognized that the law that first implemented this family waiver "was not a punitive statute, and . . . 241(f) in particular was designed to accomplish a humanitarian result. We conclude that to give meaning to the statute in the light of its humanitarian purpose of preventing the breakup up of families composed in part at least of American citizens, the conflict between the circuits must be resolved in favor of the aliens." *Errico* at 224-25. Even the dissent in *Errico* is consistent with respondent's position. Justice Stewart argued that the aliens in *Errico* were ordered deported, not because of their fraud, but because they were not properly within their countries' quotas. He went on to note, however, that: "*Fraud is removed as a ground for deportation of those with the requisite family ties*, and 'otherwise admissible' insures the integrity of the statutory scheme." *Errico* at 229 (Stewart Dissent) (emphasis added).

III.

THE BOARD OF IMMIGRATION APPEAL'S INTERPRETATION OF INITIAL FRAUD IS INAPPROPRIATELY NARROW.

In its refusal to grant respondent a family waiver under INA § 241(a)(1)(H), the Board of Immigration Appeals relied heavily on what it identified as "the serious nature of respondent's continuing course of immigration violations, both before and

after his entry in 1978." Pet. App. at 11a. In describing the respondent's "pattern of violating this country's immigration laws through fraud," the Board cited four items in chronological order:

> (1) Respondent's initial "participation in his wife's scheme to enter the United States under an assumed identity by going through a sham divorce and remarriage."
>
> (2) Respondent's entry as "the purported beneficiary of a United States citizen."
>
> (3) Respondent's application "for naturalization in 1982 and [perpetuation of] the fraud of his wife's identity as a United States citizen."
>
> (4) Respondent's participation in "another sham divorce in order to attempt to rectify his wife's initial fraud and allow her to resume her true identity."

Pet. App. at 10a (BIA's Decision).

A. The BIA's Consideration Of Respondent's Entry As "The Purported Beneficiary Of A United States Citizen" And His Participation In "Another Sham Divorce To Attempt To Rectify His Wife's Initial Fraud" Was Reversible Error.

The Board of Immigration Appeals' reliance on the second and fourth factors set forth above constituted reversible error. Consider the second factor. In its weighing of respondent's purported "continuing course of immigration violations" and "pattern of violating . . . immigration laws through fraud," the

Board included respondent's fraudulent entry as the spouse of a United States citizen. Assuming the correctness of respondent's position that the initial-fraud concept is required by statute, then the inclusion of respondent's actual fraudulent entry was a serious error by the Board. After all, his actual fraudulent entry is at the core of his so-called initial fraud. Even assuming the correctness of the government's position that the initial fraud concept is a revocable Board policy, the Board violated its own policy without fair notice or explanation when it placed the core of the initial fraud on the scale.

The Board's consideration of the fourth factor was also a serious error. The Board identified as part of his "pattern of violating" immigration laws respondent's participation in "another sham divorce in order to attempt to rectify his wife's initial fraud and allow her to resume her true identity." Pet. App. at 10a. The Board's discussion of this factor in unfavorable terms is at least puzzling if not an inappropriate mischaracterization of the act as somehow evil. Consider the context of this act in the Board's own words:

> In 1984, the respondent's wife read a newspaper article on the subject of immigration fraud, which prompted her to attempt to undo her claim of citizenship based on a birth certificate other than her own. . . . She therefore had her daughter, who had obtained United States citizenship, file a petition in her behalf under her true identity. . . . In 1985, she and the respondent again divorced. . . . The divorce decree refers to the respondent's wife by the name she acquired in 1978. Then, in 1992, they were remarried. In the 1992 marriage, the respondent's wife used her real name.

Pet. App. at 7a-8a.

The divorce of which the Board is critical in its fourth factor came in the middle of his wife's voluntarily coming forward to properly immigrate through her citizen daughter. Characterizing respondent's second divorce in pejorative terms as a "sham divorce" is patently unfair. Respondent's wife recognized her misdeeds. She was not acting in response to being detected by immigration authorities. She was attempting to rectify things voluntarily. Transcript of Deportation Hearing at 67, 81. As part of those good faith attempts, the respondent and his wife realized that their remarriage in 1978 was not appropriate so they had the marriage invalidated. They were not being surreptitious; this was a matter of public record. The new immigration applications for respondent's wife were also a matter of public record. Her old records would be matched up with her new records because she had been fingerprinted as part of both processes. Thus the divorce of which the Board was critical was part of their good faith attempt to set matters straight, so that they could immigrate legally by using their true identities. They no longer wanted to rely on their assumed personas. The Board's categorizing this act as a factor to be weighed negatively clearly merits more discussion. Indeed, the act was arguably one of good faith that should have been considered a positive factor.

B. Under The Initial-Fraud Concept, The Ingredients Of The Scheme Should Be Considered Part Of The Fraud That Triggers § 241(a)(1)(H) Relief.

The Board dismissed respondent's administrative appeal "[b]ecause we find that the serious nature of respondent's continuing course of immigration violations, both *before and after his entry in 1978*, outweighs the factors in his favor." Pet. App. at 11a. As noted above in the Board's chronology of respondent's "pattern" of fraud, the "before" part of his fraud was respondent's "participation in his wife's scheme to enter the United States under an assumed identity by going through a sham

divorce and remarriage." The problem with identifying respondent's participation in the "sham divorce and remarriage" as a separate and discrete fraud is that he could not have entered fraudulently in 1978 had it not been for the preliminary divorce and remarriage. Obviously this was all part of the respondent's fraudulent scheme to enter the United States. In the words of the court below: "These activities were clearly inextricably intertwined with Mr. Yang's own efforts to secure entry into the country and must be considered part of the initial fraud. " Pet. App. at 2a.

Respondent's scheme to enter the United States involved separate steps. The Board artificially divided his scheme into at least two steps: (a) the preliminary divorce and remarriage, and (b) the act of entering with a fraudulent visa. The Board could have just as easily divided the scheme even further: planning, preparing divorce documents, assisting his wife's return to the United States, preparing new marriage documents, completing his visa application, attending a visa interview, and using the fraudulent visa. The difficulty with the Board's analysis is that all of those steps are part of one scheme, and any fraudulent scheme can be broken down into different parts.

In the Board's view, the "after" part of the respondent's "pattern" was "perpetuation of his wife's identity as a United States citizen" in his application for naturalization. There are two reasons why respondent's naturalization application should not be weighed. The first is that, as in the case of the preliminary divorce and remarriage, it was part of respondent's overall fraudulent scheme to immigrate and become a U.S. citizen. This was another step in his overall scheme that was artificially identified separately by the Board. The naturalization application was filed in 1982; more than 10 years had elapsed when this was considered by the immigration court. The second reason is that maintaining his wife's false identity in the

naturalization application was simply part of the continuation of the respondent's new identity that was assumed as part of his immigration process. We elaborate on this point below.

The government attempts to distinguish respondent's act of seeking naturalization on more serious grounds. The government argues that not weighing the naturalization application "would lead to the forgiveness of a fraud that is more significant than the initial-fraud at which § 241(a)(1)(H) is directed. " Br. for Pet. at 35-36. The government implies that classifying the naturalization application within the "initial-fraud concept" would somehow allow the respondent to be irrevocably granted naturalization. Of course this implication is false and misleading. First of all, the respondent has not been granted naturalization. *See* Part V, *infra.* And second, if he had obtained naturalization fraudulently, respondent's naturalization could have been revoked. The government concedes this point: "Fraud in an application for naturalization as a United States citizen normally is sufficient basis for revocation of citizenship, *see* 8 U.S.C. 1451; *Kungys v. United States,* 485 U.S. 759 (1988)." Br. for Pet. at 36. Respondent's application for naturalization was part of his overall fraudulent scheme. If he had attained naturalization, his citizenship could be revoked. He is not seeking "forgiveness" for his naturalization application in the sense that the government suggests. He did not become a citizen. He is not seeking protection from citizenship revocation.

C. When The Initial Fraud Involves A Change In Identity, Subsequent Acts That Involve The Change In Identity Should Not Be Regarded As Independent Acts Of Fraud.

The Board's weighing of respondent's application "for naturalization in 1982 and [perpetuation of] the fraud of his wife's identity as a United States citizen" as a separate,

independent act would render the § 241(a)(1)(H) family waiver meaningless for someone who gained entry through a fraud that involved a new identity.

When respondent engaged in his fraudulent scheme to immigrate and become a citizen of the United States, he may not have changed his name, but he assumed a persona that clearly contained central fictional aspects: the claims that he was no longer married to his first wife and that he was married to a woman whose name he knew was an assumed identity for immigration purposes. He assumed the identity of a man who was married to this fictitious woman. In order to maintain this identity, any future contact with immigration authorities would have to be conducted with all the trappings of this new persona. Thus, in attempting to complete his fraudulent scheme by applying for naturalization in 1982, the respondent completed the application with the biographic information attached to his new identity. He repeated the exact same false information about his wife that he used in his 1978 immigrant visa application and did not fabricate anything new. To label this a new and separate act of fraud is to ignore the realities faced by individuals who immigrate based on the creation of a false identity. To label this a new and separate act of fraud that can be weighed unfavorably amounts to double counting the fraud: the first is the use of the fraudulent scheme to initiate deportation proceedings, and the second is to use parts of the scheme in violation of the initial-fraud concept attached to the § 241(a)(1)(H) waiver. Respondent's efforts to maintain his and his wife's fraudulent identities once they arrived are an extension of their initial illegality: once they began the charade of their assumed lives, they had to continue using those identities.

The scheme and assumed persona lasted less than six years. Respondent immigrated in 1978 and filed the naturalization application in 1982. But by 1984, after respondent's wife began

clearing up the fraud, the couple sought to terminate the fraudulent marriage and the scheme stopped. Respondent no longer used the false information for further immigration benefits. He did not remarry his wife until 1992 when they were advised to do so by immigration counsel (Transcript of Deportation Hearing at 127), more than 7 years after the second divorce.

Accepting the government's interpretation of the statute would eviscerate the § 241(a)(1)(H) family waiver in cases involving fraudulent immigration based on a change in identity or persona. To allow the government to artificially separate subsequent actions that are taken in the course of the new identity is contrary to the statute. This is evident in our case where the government attacks the act of applying for naturalization, when everything in the application is consistent with respondent's initial fraudulent visa and new identity in his desire to maintain his new identity. The over-zealousness of the government's position is also demonstrated in its criticism of *Delmundo v. INS*, 43 F.3d 436 (9th Cir. 1994), where the immigrant subsequently obtained a driver's license, social security card, and voter's identification card. Br. for Pet. at 32. Of course Delmundo used his new identity to obtain those documents. How else could he obtain them given his situation? Those actions were clearly an extension of Delmundo's new identity, as was the respondent's naturalization application in our case.

Respondent's and Delmundo's changes in identity as part of their fraudulent immigration to the United States are not unusual. In an earlier era of Chinese exclusion laws, many Chinese entered the United States with false documents, false claims, and of course false identities. For the Chinese involved, all aspects of their lives were affected. Indeed, these identity changes impacted subsequent generations. *See, e.g., Jen Hung Ng v. INS*, 804 F.2d 534 (9th Cir. 1986); *Yik Shuen Eng v. INS*, 464

F.2d 1265 (2d Cir. 1972); *United States ex rel. Pon v. Esperdy*, 296 F. Supp. 726 (S.D.N.Y. 1969). The lesson from these cases is that once a new identity is assumed, we should not be surprised by actions taken in accordance with the new identities. Those actions merely perpetuate the scheme of fraud for which the person is now seeking a § 241(a)(1)(H) family waiver.

D. Arguments That Specific Interpretations Would Give Rise To Anomalous Results Are Not Germane.

The government argues that the lower court's interpretation of the initial-fraud concept would give rise to anomalous results:

> The court's approach places an alien who obtains his initial entry by fraud and then commits a series of further fraudulent acts to preserve his illegally obtained status, in a better position than an alien who enters the country by lawful means, but later embarks on a similar series of fraudulent acts in an attempt to remain here. The alien who entered by fraud would, under the Ninth Circuit rule, have all of his frauds ignored in evaluating his request for a waiver of deportation under Section 241 (a)(1)(H). The alien who entered lawfully, however, would have each of the frauds in the series weighed against him if he seeks discretionary relief, such as that available under Section 212(c) . . . .

Br. for Pet. at 34.

As respondent notes below, the family waiver that is the subject of this case under § 241(a)(1)(H) is far different from

other waivers such as the exclusion waiver under § 212(c). For one thing, any survey of § 212(c) cases would reveal that most of those cases involve lawful residents who have committed moral turpitude crimes or narcotics offenses subsequent to immigration. Section 241(a)(1)(H) cases, on the other hand, involve misrepresentation at initial immigration for someone who is closely related to a citizen or lawful permanent resident. Section 212(c) does not require a relative, as does § 241(a)(1)(H). Nor does § 212(c) contain the all important "otherwise admissible" language. Thus, even the government's characterization that the Ninth Circuit has placed the § 241(a)(1)(H) client in a "better position" than the § 212(c) applicant is clearly defensible in typical respective cases.

Assuming that one agrees with the government's implication that the lower court's construction results in anomalous situations (which respondent does not concede), that certainly cannot be the test of whether the lower court's construction is correct. The lower court's reading happens to be the way the statute is formulated. The implied goal in the government's complaint of making absolute, consistent sense of the Immigration and Nationality Act runs a serious risk of frustration given the Act's labyrinthian and, in some opinions, byzantine nature.

Fraudulent immigration into the United States entailing a change in identity is of course serious business that should not be taken lightly. However in the interest of family unity, Congress has enacted legislation that gives a new chance to aliens immigrating through fraud who have citizen or resident alien relatives in the United States. That interest in family unity is built into the statute in a manner that overrides the fraudulent scheme of immigration. Only separate, unfavorable factors that have nothing to do with the fraudulent scheme of immigration can override the family unity interest.

Some may be troubled by this result, but certainly not the citizen relative or the immigrant. The solution for those troubled by the result lies beyond the parameters of the statute. But at least in the instant case, the inquiry has not ended (even in the view of the court below) since the separate, unfavorable factor of respondent's lack of candor before the immigration court has yet to be weighed fairly.

IV.

THE GOVERNMENT'S ANALOGIES TO OTHER WAIVERS AND DISCRETIONARY RELIEF ARE MISPLACED.

The case before the Court is one involving the selection of criteria that can properly be weighed in the exercise of discretion. The respondent's position is that the initial or original fraud, along with actions inextricably intertwined with the fraudulent entry or taken pursuant to an identity change, are not to be weighed in the exercise of discretion. So the case is one involving the selection of criteria as opposed to how to apply and weigh the proper criteria. Respondent's position flows from his construction of the statute and particularly the "otherwise admissible" language of § 241(a)(1)(H).

Thus, this case is not an abuse of discretion case in the sense that respondent is saying that the Court ought to substitute its judgment for that of the agency after a *de novo* weighing of the relevant criteria. Nor is it an abuse of discretion case in the sense that respondent feels that insufficient weight was given particular positive items. Instead, respondent's position is that the Board violated the statute, *i.e.*, abused its discretion, by placing something on the scale that the statute forbids. So the case is very much one of statutory construction.

The government contends that in developing its approach to § 241(a)(1)(H), the Board has "drawn on principles developed under other discretionary waiver[s]" and that this approach is well within its broad discretion. Br. for Pet. at 23, 27. Illustrative of this position is the government's reliance on cases involving a waiver under § 212(c) and suspension of deportation pursuant to § 244(a). These analogies are misplaced because the purpose, history, and language of § 241(a)(1)(H) are so different.

The government cites *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978), a § 212(c), case for its prime example of the Board's practice of "balancing of the alien's undesirability as a permanent resident [against] the social and human considerations present to determine whether according him such relief is in the best interest of this country." Br. for Pet. at 23. Prior to the recent enactment of the anti-terrorism legislation, § 212(c) provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the *discretion* of the Attorney General without regard to [exclusion provisions with certain exceptions. This] subsection shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years.

Then arguing that the Board is deserving of "substantial deference" in interpreting and administering the immigration laws, the government cites as "similar circumstances" the

interpretation of suspension of deportation provisions in Section 244(a). Br. for Pet. at 27. Under § 244(a),

> [The] Attorney General may, in [her] *discretion* suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien . . . [who] has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

The principal problem with the government's attempt to liken § 241(a)(1)(H) with §§ 212(c) and 244(a) is that the latter two do not contain the "otherwise admissible" language. The latter two do not instruct the decisionmaker to discount the initial fraud or initial bad act. Instead, §§ 212(c) and 244(a) use the term "discretion" (and in fact "good moral character" is used in suspension), thus inviting everything relevant to be placed on the scale. Thus, in a § 212(c) case, the circumstances that render the alien excludable are relevant because there is no "otherwise admissible" language as there is in § 241(a)(1)(H) or the more analogous § 212(i). Similarly, for suspension under § 244(a) the circumstances that have led to the person's deportability, such as illegal entry, may also be weighed.

A recent change to § 212(c) is also illuminating. The

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was signed into law on April 24, 1996. Section 440(d) of AEDPA eliminates § 212(c) for any alien who is "deportable by reason of having committed any criminal offense covered in" provisions such as those relating to aggravated felonies, controlled substances, and firearms. This is strong indication that when it comes to lawful immigrants who have committed certain deportable crimes, Congress is unforgiving even though many of those immigrants have citizen and lawful resident alien relatives (equities that the Board had previously given great weight to in *Matter of Marin, supra*). In spite of the opportunity in AEDPA and recent legislation aimed at curbing illegal immigration (which contains many provisions that relate to deportation provisions that affect legal immigrants), Congress has not attempted to limit the availability of the § 241(a)(1)(H) family waiver. In fact, the most recent change to the provision in 1990 was expansive. In the case of immigrants who enter through fraud, family unity remains an overriding policy for those immigrants who have close citizen or lawful resident alien relatives in the United States.

The government's reliance on *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam) is particularly misplaced. Brief for the Petitioner at 27-28. Besides the fact that the case involved suspension of deportation under § 244(a) rather than a waiver under § 241(a)(1)(H), the case concerned a motion to reopen rather than review of a denial of substantive relief. Aliens moving to reopen proceedings are in the most powerless posture in deportation proceedings. Motions to reopen are not authorized by statute, but rather are provided for in regulations promulgated by the Attorney General. *See* 8 C.F.R. § 242.22. They involve aliens who have already had deportation hearings. After the hearing but before departure is enforced or while an appeal is pending, the person feels that he or she can now meet the statutory requirements for a relief that was not available at the

earlier hearing. These aliens have to make a motion to reopen deportation proceedings. But this Court has made clear that when the alien is in that posture or position, the courts must pay the greatest deference to the agency. *See, e.g., INS v. Rios-Pineda,* 471 U.S. 444 (1985). The alien has a tremendous burden to overcome in that posture.

The respondent in this case and others seeking statutory § 241(a)(1)(H) family waivers in the first instance should not be analogized to aliens who have already had a bite at the apple who are seeking super-discretionary action to grant them a second or third hearing.

V.

AFFIRMING THE NINTH CIRCUIT'S DECISION WILL HAVE NO EFFECT ON THE REGULATION OF NATURALIZATION CASES.

In footnote 17 of Petitioner's Brief, petitioner argues that affirming the lower court's decision in this case will intrude upon the agency's handling of naturalization matters by preventing the Attorney General from considering the alien's misrepresentations as evidence of bad moral character, thereby frustrating Congress' intent of requiring "good moral character" as a prerequisite to naturalization. Br. for Pet. at 36, 37 n. 17. Petitioner is wrong. Obtaining a waiver of deportation under § 241 (a)(1)(H) does not compel a finding of good moral character under 8 U.S.C. § 1427. The requirements for a waiver under § 241(a)(1)(H) and naturalization are unrelated.

Even though the Attorney General lacks discretion to consider pre- or post-entry concealment in adjudicating a waiver application under § 241(a)(1)(H), this does not compel the conclusion that she would not be able to consider these same acts

in the context of a naturalization application. The section cited by the government, 8 U.S.C. § 1427, states quite specifically that, "[no] finding by the Attorney General that the applicant is not deportable shall be accepted as conclusive evidence of good moral character." 8 U.S.C. § 1427(d). Moreover, the Attorney General can consider the applicant's conduct, *in its entirety,* both before and after being admitted for permanent residence, in determining whether the applicant has established "good moral character" for the purpose of naturalization. 8 U.S.C. § 1427(e). In addition, Congress has specifically stated that an applicant who has given false testimony in order to obtain an immigration benefit is *precluded* from establishing good moral character. 8 U.S.C. § 1101(f)(6).

Section 241 (a)(1)(H) has no "good moral character" requirement. If it did, every applicant who had committed fraud in immigrating would be precluded from establishing good moral character pursuant to 8 U.S.C. § 1101(f)(6). The situation would be hopeless because the fraud waiver applicant would be precluded from receiving the waiver due to the very fraud he was seeking to waive.

Receiving a waiver does not mean that the alien is of good moral character, or that the misrepresentations have been "erased" for all purposes. The grant of the waiver merely means that the alien's *deportation* has been waived due to overriding equities and family ties. Disregarding an alien's pre- and post-entry concealment for the purpose of waiving deportation, yet requiring the alien to show a longer period of rehabilitation in order to qualify for naturalization would be entirely proper. This would be consistent with the intent of Congress in leaving out a "good moral character" requirement in the § 241(a)(1)(H) family waiver.

CONCLUSION

We are living in an era when immigrants are particularly unpopular. In spite of the immigrant bashing, certain humanitarian and compassionate provisions have been retained in the Immigration and Nationality Act. Asylum and withholding provisions in §§ 208 and 243(h), suspension of deportation for hardship cases in § 244(a), registry for long-term undocumented in § 249, and waivers for victims of spousal abuse in § 216(c)(4) are all examples of such provisions. The § 241(a)(1)(H) family waiver is no less central to the character of the humanitarian provisions of the Act.

The retention and viability of these humanitarian provisions are important for Congress to continue. They constitute statutory recognition that not only does deportation deprive a person of liberty, but it "may result also in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Until Congress changes the language of a particular section of the Immigration and Nationality Act, we must continue to look at the plain language of the provision and the statutory structure. Because of the nature of deportation, "[m]eticulous care must be exercised" in cases of this nature. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

For the reasons stated in this brief, the decision of the Court of Appeals should be affirmed. The case should be remanded to the agency for a proper evaluation of the equities and misdeeds as required by the statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WALTER DELLINGER
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IMMIGRATION AND NATURALIZATION SERVICE,
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REPLY BRIEF FOR THE PETITIONER

Respondent devotes most of his brief to the contention that the text of Section 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1)(H), prohibits the Attorney General from considering the nature or gravity of the fraud committed by an alien at the time of his initial entry into the United States when deciding whether to exercise her discretion to grant the alien a waiver of deportation. Respondent's view is based on a misunderstanding of the statutory text, specifically the requirement that the alien be "otherwise admissible" in order to be eligible for a waiver. Section 241(a)(1)(H) defines the category of aliens who are eligible for a waiver of deportation through that and

other requirements, but then commits entirely to the Attorney General's discretion the decision whether to grant such a waiver to any alien who satisfies the eligibility requirements. Section 241(a)(1)(H) imposes no limitations on the factors the Attorney General may consider in making that determination.

In any event, the Attorney General, through the Board of Immigration Appeals, has to date adopted a more lenient policy: the Board does not include the fraud or misrepresentation at the time of the alien's initial entry in its otherwise comprehensive balancing of factors it deems relevant to the discretionary waiver decision. Consistent with that approach, the acts of fraud taken into account by the Board in declining to grant respondent's request for a waiver of deportation were not committed at the time of respondent's initial entry. Respondent essentially concedes as much, but argues that the Board was nonetheless required to ignore the entire pattern of immigration fraud in which he engaged, both before and after his fraudulent entry. In particular, he argues that, in identifying the relevant equities, the Board must disregard all acts of fraud and misrepresentation committed by the alien to establish a false identity before entering the country and then to maintain that identity after entry—culminating, in respondent's case, in false statements he made four years later in applying for naturalization. Nothing in the text of Section 241(a)(1)(H), or in the nature of discretionary relief under the INA, remotely suggests that the Attorney General must follow such a rule. The courts therefore must defer to the Attorney General's identification of the factors she deems relevant to discretionary waiver determinations under Section 241(a)(1)(H) and her weighing of

those factors in each particular case. The Attorney General's determinations on these issues may be set aside by a court only if they are arbitrary or constitute an abuse of discretion.

1. Respondent recounts in detail the history of Section 241(a)(1)(H) and the earlier statutory versions of that waiver authority. See Resp. Br. 7-18. Respondent relies on that history to argue (Resp. Br. 6, 11-16) that Congress, by use of the phrase "otherwise admissible" in Section 241(a)(1)(H), prohibited the Attorney General from considering "the fraud that gave rise to deportability in determining whether to grant a waiver" (Resp. Br. 6). Respondent misreads the Act. In deciding whether an alien is eligible to be considered for a discretionary waiver, the Attorney General must determine if the alien would be "*otherwise* admissible"—that is, whether the alien would be inadmissible on any ground other than those that are specifically identified in Section 241(a)(1)(H) itself: fraudulent or willful misrepresentation at the time of entry, and the lack of a labor certification or valid visa or other entry document that was a direct result of that fraud or misrepresentation. See 8 U.S.C. 1182(a)(6)(C)(i), (5)(A), and (7)(A). If the alien is inadmissible for any other reason, he is not even eligible for a waiver under Section 241(a)(1)(H). But if the alien is found to be "otherwise admissible" and to meet the other threshold requirements under Section 241(a)(1)(H), the Attorney General may then decide whether to grant a waiver as a matter of discretion. The "otherwise admissible" prerequisite to eligibility places no limits on that ensuing exercise of discretion. Cf. *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985).

Respondent also seeks support from *INS* v. *Errico*, 385 U.S. 214 (1966) (see Resp. Br. 9, 11-12, 16, 20, 28), in which this Court held that, when determining whether an alien was "otherwise admissible" under a predecessor of Section 241(a)(1)(H) (see INA § 241(f), 8 U.S.C. 1251(f) (1964)), an alien who had misrepresented his status to evade quota restrictions was not, for that reason, inadmissible. That holding is fully consistent with the Attorney General's position in this case. When *Errico* was decided in 1966, a waiver under Section 241(f) was *mandatory*; the Attorney General was given no discretion to deny a waiver to an alien who satisfied the eligibility criteria. Thus, the words "otherwise admissible" in Section 241(f) at that time clearly related to the alien's eligibility for the waiver, not to any exercise of discretion, and the Court simply held in *Errico* that an alien was not rendered ineligible on the basis of the underlying quota restriction that his fraud or misrepresentation at entry had been designed to evade. Congress amended Section 241(f) in 1981 to render the waiver determination discretionary. Pub. L. No. 97-116, § 8, 95 Stat. 1616; see Gov't Br. 20-23. The phrase "otherwise admissible," however, continued to pertain to eligibility, not the newly conferred discretionary authority. And because that phrase referred to possible grounds for exclusion *other* than the fraud or misrepresentation at the time of initial entry, it could not in any event be thought to have any bearing on whether the initial fraud or misrepresentation may be considered in the exercise of discretion. Most importantly, however, for those aliens who satisfy the threshold eligibility criteria, the 1981 amendments conferred discretionary authority on the Attorney General in unqualified terms to grant or deny relief.

Other aspects of the revisions made in 1981 likewise refute respondent's notion that Congress intended to mandate a general liberalization of waivers under Section 241(a)(1)(H). For example, Congress added a statutory eligibility requirement that an alien be "in possession of an immigrant visa or equivalent document" at the time of entry, thereby confirming the Court's ruling in *Reid* v. *INS*, 420 U.S. 619, 620 (1975), that had limited *Errico* to its facts and excluded from eligibility those aliens who were deportable on the ground that they entered without inspection. Congress also clarified that, in determining whether an alien meets the "otherwise admissible" requirement, the only grounds of inadmissibility that should not be considered were those listed in 8 U.S.C. 1182(a)(14), (20), and (21) (1970) (now 8 U.S.C. 1182(a)(5)(A) and (7)(A) (lack of necessary labor certification, valid visa or other entry document)). See Pub. L. No. 97-116, § 8, 95 Stat. 1616. And Congress limited even that exception to cases in which the lack of labor certification or other document was a "direct result" of the alien's fraud or misrepresentation at the time of entry. *Ibid.*; see *Errico*, 385 U.S. at 217 (describing prior administrative practice to the same effect).[1] Thus, despite

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[1] A lack of a labor certification or valid visa or other documentation might often be the "direct result" of the fraud at the time of entry because those matters were the very subject or inevitable consequence of the fraud. The pattern of fraudulent conduct cited by the Board in this case, by contrast, is plainly not the "direct result" of respondent's fraud at the time of entry. Thus, the statutory text addressing eligibility for a waiver repudiates respondent's suggestion that Congress intended to require the Attorney General to ignore acts of

respondent's contention that the 1981 amendments "served to expand the waiver" (Resp. Br. 16), those amendments clarified several important limitations on eligibility.

Any doubt about Congress's intention in making the waiver provision discretionary rather than mandatory is dispelled by consideration of the circumstances under which the waiver provision was amended—a portion of the legislative history that respondent ignores. As pointed out in our opening brief (Gov't Br. 21-23), a bill was introduced in Congress in 1979 that, among other things, would have eliminated the statutory waiver altogether. See H.R. 5087, 96th Cong., 1st Sess. The Acting Commissioner of the INS testified, however, that the Department of Justice opposed a total elimination of the waiver and urged, instead, that the waiver be made discretionary with the Attorney General so that relief could be granted "in cases where the misrepresentations may be outweighed by family ties." See *Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 4, 7-8 (1979). Congress revised the bill consistent with the Department of Justice's suggestion, and the House Report on the revised bill echoed the Department's views. See H.R. Rep. No. 264, 97th Cong., 1st Sess. 25 (1981). The House Report contains no intimation of any intent to require the Attorney General to exercise her newly conferred discretion either broadly or narrowly, or to limit the

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fraud that were distinct from the one committed at the time of entry.

factors that the Attorney General could deem relevant in making individual waiver decisions.

Respondent nonetheless appears to argue (Resp. Br. 12-17) that the 1981 amendments should not be interpreted to confer discretion on the Attorney General to consider the nature or gravity of the initial fraud itself because that was not an issue that had caused confusion among lower courts in interpreting the prior mandatory waiver provision. In respondent's view (Resp. Br. 21-23), the "introduction of discretion" in 1981 applied only in such grey areas of statutory interpretation, or in connection with aliens who came within any expansion of eligibility that might have occurred in 1981. The difficulty with that assertion is that the text Congress enacted does not limit its grant of discretion to the Attorney General to any particular category of cases. Rather, Congress granted the Attorney General unfettered discretion to grant or deny a waiver of deportation with respect to all aliens who satisfy the threshold standards of eligibility under Section 241(a)(1)(H).[2]

2. When respondent turns to the question actually presented by this case—whether the Attorney

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[2] Respondent errs in asserting (Resp. Br. 26) that the government previously conceded that respondent's statutory interpretation is correct. Respondent quotes the Fifth Circuit in *Liawang* v. *INS*, 872 F.2d 685, 687 (1989), stating that, in its brief in that case, "the INS concedes that the original fraudulent act should not be considered as an adverse factor in the balancing equation." The INS did not concede in its brief that its view was compelled by the statutory text, however, and did not indicate that its view was based on anything other than the Board's policy determination that it should not consider the initial-entry fraud for purposes of making a Section 241(a)(1)(H) waiver decision.

General, in exercising her discretion under Section 241(a)(1)(H), may consider fraudulent conduct in which an alien engaged before or after his fraudulent entry—respondent contends (Resp. Br. 29-36) that all of the acts of fraud upon which the Board relied in denying him a waiver must be treated as part of one single fraud at the time of entry, and therefore beyond the discretion of the Attorney General to consider.[3] Respondent's submission would remove the limiting concept of "entry" from the analysis and convert

[3] Respondent also contends (Resp. Br. 29-30) that the Board acted inconsistently with its own policy and weighed respondent's own fraudulent entry (purportedly as the spouse of a United States citizen). Respondent relies on the Board's general description of respondent's pattern of violating the immigration laws, during which the Board mentioned, *inter alia*, respondent's fraudulent entry. Pet. App. 10a. Read in context, however, it is clear that the Board did not weigh that initial-entry fraud when making its decision. In fact, the Board specifically noted that the Immigration Judge acted properly when he disregarded that initial fraud in evaluating the merits of the application for discretionary relief. See *Ibid.* Moreover, immediately prior to its description of respondent's pattern of fraud, the Board stated that the only adverse factors it considered in this case were "the respondent's acts of immigration fraud before and after his 1978 entry into the United States and his apparent lack of candor during the deportation hearing regarding the knowledge of the significance of his fraud." *Ibid.* Immediately after its description of respondent's pattern of fraud, the Board reiterated its view that it could disregard the initial fraud—but not "his remaining acts involving fraud"—for purposes of the waiver determination. *Ibid.* Finally, in the closing paragraph of its opinion, the Board restated that the factors in respondent's favor were outweighed by "the serious nature of respondent's continuing course of immigration violations, both before and after his entry in 1978." *Id.* at 11a.

Section 241(a)(1)(H) into an open-ended license to lie. Nothing in Section 241(a)(1)(H) supports that construction. But if there were any ambiguity on the point, the Attorney General's interpretation of the statutory text is entitled to deference. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987).

Moreover, as we have explained above, the Board's decision not to take into account the initial-entry fraud is a product of the Board's exercise of its own discretion, not the text of Section 241(a)(1)(H) itself. The Board therefore is entitled to even broader deference in articulating the scope of that discretionary exception than it is in interpreting the INA. The Board's conclusion that respondent's course of fraudulent conduct did not fall within its exception for fraud at the time of entry plainly did not constitute an abuse of discretion.

a. Respondent contends (Resp. Br. 31-32) that his participation in his wife's fraudulent entry into the United States under an assumed identity should not be treated as a separate fraud because her entry was necessary to facilitate his own. That is so, he asserts, because his own fraudulent entry was based on his wife's already having entered the United States and obtained false documents identifying her as a U.S. citizen by birth. Contrary to respondent's contention, the fraud in which he participated to enable his wife to enter the United States under an assumed name was quite independent of his own entry. It constituted fraud regardless of whether respondent subsequently entered the United States. Respondent's significant participation in perpetrating that fraud, including his entering into a sham divorce from his wife in 1977 in Taiwan and making available the $60,000 for the purchase of a fraudulent U.S. birth

certificate and passport for his wife in the name of Mary Wong, plainly warranted consideration by the Board when weighing the factors for and against a discretionary waiver of deportation based on respondent's own fraudulent entry. Respondent emphasizes the purpose of Section 241(a)(1)(H) to promote family unity by allowing the Attorney General to forgive fraud or misrepresentation at the time of entry to allow an alien to remain in the United States with his spouse, parent, or child. See Resp. Br. 7-18, 28, 37. But surely Congress did not intend to endorse a practice whereby an alien first helps his relative to enter the United States by fraud and then seeks to have his own fraudulent entry forgiven in the name of preserving family unity in the United States.

b. Respondent also contends (Resp. Br. 32-33) that his submission of a fraudulent petition for naturalization in 1982 was improperly weighed by the Board as an adverse factor, because his representation in the naturalization application that his wife was a U.S. citizen "was simply part of the continuation" of the new identity that he had "assumed as part of his immigration process." Respondent goes so far as to argue (Resp. Br. 33-37) that, whenever an alien enters by a fraud that involves the assumption of a false identity, any subsequent acts that "involve" that false identity should not be regarded as independent of the entry fraud for purposes of a waiver under Section 241(a)(1)(H).

Respondent asserts that to regard other uses of an alien's false identity as separate acts of fraud (as in the case of false statements on respondent's naturalization petition) would "ignore the realities faced by individuals who immigrate based on the creation of a false identity" and would constitute "double count-

ing the fraud." Resp. Br. 34. In other words, according to respondent, once he and his wife "began the charade of their assumed lives, they had to continue using those identities." *Ibid.* But respondent did not "have to" apply for naturalization as a U.S. citizen, much less to do so by submitting a fraudulent petition. By applying for naturalization, respondent sought the significant additional benefits that are part of United States citizenship, greater benefits by far than those he had obtained through his fraudulent entry as an immigrant. Weighing that fraudulent naturalization application did not unfairly "double count" respondent's fraud at entry—it properly weighed the additional fraud that respondent attempted to perpetrate on the United States in order to gain additional benefits. Respondent concedes (Resp. Br. 33) that fraud in an application for naturalization is a sufficient basis for revocation of citizenship. See *Kungys* v. *United States*, 485 U.S. 759 (1988). His attempt to belittle such conduct by asserting that it cannot even be considered as a negative factor in considering whether to grant discretionary relief from deportation is wholly without merit.[4]

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[4] Respondent suggests (Resp. Br. 34-35) that his fraudulent identity and scheme lasted less than six years because, by 1984, his wife "began clearing up the fraud" by reclaiming her true identity. Respondent apparently did not withdraw his naturalization petition, however. See Admin. Rec. 84, 89, 240. Moreover, he did not remarry his wife until 1992, *id.* at 88, after it had become known that the INS was aware of the various fraudulent acts by respondent and his wife. If respondent had remarried his wife sooner, of course, he would not have been able to pursue his fraudulent naturalization application.

More generally, the flaw in respondent's position is that it would transform a limited statutory provision for a discretionary waiver of a discrete ground of deportability based on a discrete act of fraud, into an open-ended immunity from having any immigration consequences attached to an ongoing course of fraudulent conduct. Congress no doubt expected, however, that the aliens who would benefit from Section 241(a)(1)(H) were those who, after their initial entry, had become open and honest members of society. It therefore is pure bootstrap to suggest that a fraudulent entry under Section 241(a)(1)(H) constitutes an excuse for continuing to maintain a "new" (false) identity in the United States.

c. Finally, respondent contends (Resp. Br. 30-31) that the Board committed "a serious error" when it considered, as an adverse factor, respondent's participation in a second sham divorce from his wife in 1985. Respondent asserts that the Board inappropriately mischaracterized the second divorce as "somehow evil," and that describing it "in pejorative terms as a 'sham divorce' is patently unfair," because his wife "recognized her misdeeds" and was not acting in response to detection by immigration authorities. *Id.* at 30, 31. He describes their second divorce as coming "in the middle of his wife's voluntarily coming forward to properly immigrate through her citizen daughter." *Id.* at 31. Respondent claims that "[a]s part of those good faith attempts, [he] and his wife realized that their remarriage in 1978 was not appropriate so they had the marriage invalidated." *Ibid.* He also claims that the divorce was not surreptitious and was a matter of public record, and that the records of his wife's second immigration application would be related to her earlier records "because she

had been fingerprinted as part of both processes." *Ibid.* According to respondent, therefore, "the divorce of which the Board was critical was part of their good faith attempt to set matters straight, so that they could immigrate legally by using their true identities." *Ibid.* Respondent even suggests that the divorce "was arguably one of good faith that should have been considered a positive factor" by the INS. *Ibid.*

Examination of the documents submitted by respondent's wife in support of her supposed attempt to "properly immigrate through her citizen daughter" belie respondent's characterization of the circumstances surrounding their second divorce. As respondent concedes, he and his wife obtained a second divorce not because they had grounds for a legal divorce but, rather, because his wife wanted to shed the fraud of their second marriage under her false name so that she could attempt to immigrate as a relative of her citizen daughter. According to the form submitted by the daughter in question, the daughter became a naturalized citizen on April 20, 1984. Admin. Rec. 238. Approximately two weeks later, she filed a petition to classify respondent's wife as an alien relative for purposes of issuing an immigrant visa, listing the true identity of respondent's wife, but failing to list Mary Wong as a name she knew had been used previously by respondent's wife. *Id.* at 211-212, 237-238.

On December 18, 1984, respondent's wife signed, and swore to the truth of, an application for an immigrant visa and alien registration as the relative of her naturalized citizen daughter. Admin. Rec. 233-236. In that application, however, respondent's wife again included false and misleading information. See

Pet. App. 22a-23a; Admin. Rec. 153-155. For example, in response to a request for other names that she has used or by which she has been known, she listed only her maiden name "Wang," not Mary Wong, as had appeared on the documentation she had been using for the preceding six years. Pet. App. 22a; Admin. Rec. 233. In response to a request for the name and address of her husband, she indicated "N/A" for not applicable. *Ibid.* She also stated that she was divorced and that she had been married only one time. *Ibid.* Yet, she and respondent already had been married twice by that time. See Pet. App. 22a; Admin. Rec. 127-128, 134, 242-243. And respondent was still her husband at that time. Their second divorce terminated their second marriage on February 13, 1985. Pet. App. 17a-18a; Admin. Rec. 252. Respondent's wife misrepresented the dates of her previous residence in and visits to the United States. Pet. App. 22a-23a; see Admin. Rec. 154-155, 234. Respondent's wife also checked "no" in response to the question whether she was within the class of aliens who had procured a visa or other documentation by fraud or willful misrepresentation. *Id.* at 235.

Thus, although the record does not provide a basis for directly attributing to respondent the false and misleading statements of his wife, the second divorce between respondent and his wife in 1985 cannot be characterized as "part of their good faith attempt to set matters straight," as respondent claims. In light of the record in this case, the Board plainly did not abuse its discretion in regarding that divorce—as well as the overall pattern of fraudulent conduct in which respondent participated before and after his unlawful entry—as negative factors weighing against

an award of discretionary relief. See *INS* v. *Rios-Pineda*, 471 U.S. 444, 451-452 (1985).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

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IN THE
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OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
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v.

YUEH-SHAIO YANG,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-938

IMMIGRATION AND NATURALIZATION SERVICE,
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v.

YUEH-SHAIO YANG,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters nationwide, who believe the judiciary has often overreached in the past in striking down effective approaches to crime prevention. While WLF engages in litigation in a variety of subject areas, WLF devotes a substantial portion of its resources to

participating in litigation in this Court, lower federal courts, and state courts on constitutional issues involved in controlling crime. *See, e.g., United States v. Armstrong* (Sup. Ct. No. 95-157); *Davis v. United States*, 114 S. Ct. 2350 (1994); *California v. Acuna* (Cal. S. Ct. No. S046980).

All parties have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

> *[W]e are not at liberty to disregard language in recent [Ninth Circuit] cases which appears to substitute our discretion for that of the Attorney General.*

Alquisalas v. Immigration and Naturalization Service, 61 F.3d 722, 724 (9th Cir. 1995). This statement in an earlier Ninth Circuit decision sums up what this case is about. The decision below is part of a line of decisions in which the Ninth Circuit has substituted its views on immigration enforcement for the Attorney General's.

Specifically, this is a case in which the Ninth Circuit overruled an agency's application of a statute giving the Attorney General discretion to waive deportation of one who has taken part in a protracted scheme of immigration fraud. The record shows that Respondent performed or participated in the following acts:

1. Respondent and his wife divorced in Taiwan so that she could become a U.S. citizen with "investor" status, which she understood to require that she be unmarried. Pet. App. 7a, 16a.

2. Wife, now single, obtained a fraudulent birth certificate and passport with a false name. *Id.*

3. Respondent and wife remarried in Taiwan. *Id.*

4. Respondent obtained entry to the U.S. as husband of a U.S. citizen. *Id.*

5. Respondent and wife petitioned for immigrant status for their four adult children. *Id.*

6. Respondent's son and daughter claimed to be married in order to allow the daughter to enter the this country. Pet. App. 17a, 23a.

7. Respondent applied for naturalization, claiming to be married to a U.S. citizen-by-birth on the basis of her false birth certificate. Pet. App. 7a.

8. Wife abandoned her false name and had her daughter petition for her to immigrate as a parent of a U.S. citizen. Pet. App. 7a-8a, 17a.

9. Respondent and wife divorced again. Pet. App. 8a, 17a-18a.

10. Respondent and wife remarried again, using her true name. Pet. App. 8a, 18a.

11. Respondent and wife, at the deportation hearing, denied knowing there was anything wrong in all this. Pet. App. 8a, 21a.

12. Respondent falsely claimed he needed the economic support of his children in this country. Pet. App. 23a-24a.

The court of appeals ruled that fraudulent acts and misrepresentations, no matter how many or how long maintained, cannot be considered so long as the motive behind them is to enter and stay in this country. The court ruled not just that the Attorney General cannot make a decision based on multiple acts of fraud of this sort, but that she may not even *consider* such acts when she exercises her "discretion" as to whether to make an exception to the law requiring deportation. In effect, the court declared an amnesty for all fraudulent acts aimed at allowing a deportable person to avoid being deported.

The court's reasoning was as follows:

1. The statute says that an alien "shall" be deported on the order of the Attorney General if he has misrepresented a material fact.

2. But the statute also says that deportation "may, in the discretion of the Attorney General, be waived."

3. The Board of Immigration Appeals had earlier stated that

> Obtaining visas by fraud and misrepresentation shows disrespect for the law, but this is the action for which they seek to be forgiven and should not be held as an adverse factor.

In re Alonzo, 17 I. & N. Dec. 292, 294 (1979); *In re DaSilva*, 17 I. & N. Dec. 288, 290 (1979).

4. The Ninth Circuit had adopted this policy in several of its decisions: *Braun v. INS*, 992 F.2d 1016 (9th Cir. 1993); *Casem v. INS*, 8 F.3d 700, 703 n. 1, 704 (9th Cir. 1993); *Delmundo v. INS*, 43 F.3d 436 (9th Cir. 1994). In particular, the court felt bound by the *Delmundo* holding that fraudulent acts committed in applying for permanent resident status and obtaining a driver's license, social security card, and voter's identification card were an "extension" of the original fraudulent entry.

5. The Ninth Circuit, relying on these cases, extended the "original fraud" principle to cover not just the original fraud but also all other acts of fraud designed to allow the deportable person to remain in the United States. *Braun v. INS*, 992 F.2d 1016 (9th Cir. 1993).

SUMMARY OF ARGUMENT

1. Although the statute on its face commits the waiver of deportation to the agency's discretion, the court of appeals erroneously permitted the Service no discretion at all, instead substituting its own discretion and reviewing the agency decision *de novo*. This standard of review was contrary to this Court's earlier holdings that such agency decision be reviewed for "abuse of discretion."

2. Even if Congress had not expressly committed the waiver of deportation to the agency discretion, the interpretation by the Service of the statute it administers is entitled to some deference under this Court's *Chevron* doctrine. The court of appeals erred by failing to give such deference.

ARGUMENT

I. Where, As Here, The Decision To Waive Deportation Is Expressly Vested in the Agency, That Decision Can Be Reviewed Only For An Abuse of Discretion

The statute at issue in this case provides that an alien "shall" upon the order of the Attorney General be deported if he has misrepresented a material fact. Respondent below conceded he was in this category. Pet. App. 6a.

But the statute goes on to say that the provisions relating to deportation "may, in the discretion of the Attorney General, be waived." 8 U.S.C. § 1251(a)(1)(H). This "discretion" is limited in one direction only: the Attorney General may not even begin to exercise her discretion unless the person is kin to a citizen or someone lawfully admitted and he was otherwise admissible (except for those grounds of inadmissibility which were a direct result of his fraud or misrepresentation). 8 U.S.C. § 1251(a)(1)(H). Nothing in the statute, on the other hand, prescribes conditions under which the Attorney General *must* waive deportation: deportation is the rule, waiver the exception.

In various contexts, there has been confusion about when a decision is "committed to agency discretion by law," and therefore largely *unreviewable* by the terms of APA § 701, and when it is reviewable for "abuse of discretion" under APA § 706. *See* Administrative Procedure Act, 5 U.S.C. §§ 701(a)(2), 706; C. Koch, Jr., *Administrative Law and Practice* 9.7, 9.32 (1985).

> The analytical problem is that of determining when the agency action is "committed to agency discretion" within the meaning of section 10 of the Administrative Procedure Act, and when it merely "involves" discretion which is nevertheless reviewable. 4 Davis, Administrative Law Treatise § 28.16, pp. 80-81; Anno., Administrative Procedure Act, 97 L.Ed. 884, 889.

Ferry v. Udall, 336 F.2d 706, 711 (9th Cir. 1964). An Attorney General's decision not to deport resembles a prosecutor's decision not to prosecute, the classic example of a decision that is not reviewable. *See Cakmar v. Hoy*, 265 F.2d 59, 62 (9th Cir. 1959) (under previous statute, Attorney General need not act at all; if he does, the court has jurisdiction to determine if procedural due process was done).

For the type of decision at issue here, though, this Court has said that the standard of review is "abuse of administrative discretion." *Foti v. Immigration and Naturalization Service*, 375 U.S. 217, 228 (1963). Denial of suspension of deportation as a discretionary matter is reviewable only for "arbitrariness and abuse of discretion." *Id.*, 375 U.S. at 228 n.15. *See generally INS v. Rios-Pineda*, 471 U.S. 444 (1985).

Contrary to this direction, the court of appeals allowed the agency no room for discretion at all. Instead, the court decided that among the several acts listed above, all (except one) must be ignored because they are "intertwined" with the original fraud.

The court below claimed that it was applying an "abuse of discretion" standard. Its reasoning was that it is an abuse of discretion to consider an "irrelevant" factor, and the initial fraud was one such, along with all other frauds directed to the same end. *See also Lising v. Immigration and Naturalization Service*, No. 94-70445, 1995 U.S. App. LEXIS 36638 (9th Cir. December 27, 1995). The Ninth Circuit has since extended this umbrella to cover fraudulent acts committed to gain benefits for one's family as well as oneself. *Id.* In yet another case, it has overruled the BIA on the weight to be given a drug conviction. *Elramly v. INS*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3623 (Mar. 19, 1996).

The result of this judicial lawmaking is to erect a complex set of detailed rules governing when the BIA can decline to grant a waiver. These rules were clearly not prescribed by Congress, they are not demanded by the statute, and indeed reasonable people might well conclude that they are ill-founded. For example, it is hard to see why the court below would allow the BIA to consider even Respondent's lack of candor before the immigration judge, since surely that, too, was aimed at allowing Respondent to remain in the United States; in the court's reasoning, this allegedly dishonest testimony was surely as "intertwined" with Respondent's efforts to secure entry, as much an "extension" of the initial fraudulent entry, as were the other fraudulent acts.

None of the Ninth Circuit decisions prescribing when deportation is to be waived, including the decision below, reflect an "abuse of discretion" standard. When a court forbids the agency from considering facts that are plainly relevant to the decision to waive deportation, that court has effectively engaged in *de novo* decisionmaking.

II. The Service Is Entitled To Deference In Interpreting A Statute That It Has Been Charged With Administering

The court below readily accepted the Immigration Board's policy that, when considering a request for a waiver of deportation, the original fraud should be ignored. But the court then declined to accept the agency's other conclusion—namely, that subsequent acts of fraud should *not* be ignored.

Even apart from the discretion that the statute expressly vests in the Service, its interpretation must be given some deference by the courts, unless Congress's contrary intent is clear. *See Chevron, U.S.A. v. National Res. Def. Council*, 467 U.S. 837 (1984); *Motor Vehicle Manufacturers Ass'n v. State Farm*, 463 U.S. 29 (1983). Courts have applied *Chevron* to review of a BIA adjudication. *See Hamama v. Immigration and Naturalization Service*, No. 94-4088, 1996 U.S. App. LEXIS 3908 (6th Cir. March 7, 1996), *citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-50 (1987). If anything, somewhat more deference should be shown when an agency creates a policy as to how it will exercise its discretion. And an agency determination whether to grant a waiver of a rule should be given "maximum" deference. *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1408 (D.C. Cir. 1995) (Silberman, J., concurring in part and dissenting in part).

Here, however, the court allowed the agency no deference at all. It accepted the agency's policy to disregard the original fraud without comment but then added an interpretation with which the agency disagrees. Thus, the decision below alters the relationship between

court and agency and departs from traditional notions of the standard of judicial review of administrative actions.

In this case, the Attorney General sought to apply an agency policy in a manner consistent with its regularly applied terms. That policy forgives an alien's "original fraud" for purposes of determining whether to waive deportation. The Attorney General has not sought to revise the policy or to apply it to Respondent in a new or inconsistent matter. 8 C.F.R. §§ 3.1(g), 103.3(g) (1995) (noting that Attorney General and BIA decisions are precedent until overruled by her or by the Board); *cf. Southwestern Bell Telephone Co. v. FCC*, 28 F.3d 165, 169 n.2 (D.C. Cir. 1994) (*citing Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)) (requiring consistent application of, or explanation of a deviation from, a policy statement). Nor did she seek to deny Respondent a right to a fair hearing on his request for a waiver. 8 C.F.R. § 212.7(a). The only issue subject to appeal, therefore, was whether the Attorney General exercised her discretion in an abusive fashion.

Given the absence of any statutory requirement to forgive the original—much less prior or subsequent acts of—fraud, an unambiguous policy consistently applied, and no express finding that the *policy* constitutes an abuse of discretion, the Ninth Circuit's refusal to defer to the BIA decision in this case was clearly in error.

BEST AVAILABLE COPY

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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No. 95-938

In The

Supreme Court of the United States

October Term, 1995

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

YUEH-SHAIO YANG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF TEXAS - IMMIGRANT AND REFUGEE RIGHTS PROJECT AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The American Immigration Lawyers Association (AILA); the Lawyers' Committee for Civil Rights Under Law of Texas, Immigrant and Refugee Rights Project (Texas Lawyers' Committee); and the National Immigration Project of the National Lawyers Guild (National Immigration Project) submit this brief as *amici curiae* in support of the Respondent's Brief with the consent of all parties.

Amicus AILA, founded in 1946, is a national non-profit association of immigration and nationality lawyers with 34 chapters across the United States and Canada including over 4,200 members. AILA is an affiliated organization of the American Bar Association. Its objectives are to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto; and to facilitate the administration of justice therein.

Amicus Texas Lawyers' Committee, founded in 1991, is part of a national network of non-partisan, non-profit offices established originally in 1963 at the request of President John F. Kennedy to provide legal services to victims of racial discrimination. The Texas Lawyers' Committee is dedicated to defending the rights of immigrants by engaging in class action litigation, appellate advocacy and community education.

Amicus National Immigration Project is a national organization of attorneys, law students and paralegals engaged in legal projects of public concern to promote the fair and humane administration of justice relating to

immigration, nationality and refugee law. Its goal is to enable citizens to exercise their civil and constitutional rights, regardless of race, religion, nationality, gender or economic position.

Amici maintain a profound interest in the development of sound precedent regarding the availability of humanitarian relief from deportation and the preservation of meaningful judicial review of agency decisions. Amici are particularly concerned when public sentiment has entrenched itself against an identifiable group of individuals, as it has against immigrants in the United States, that the judiciary be especially rigorous in enforcing statutory limits on the exercise of agency discretion.

SUMMARY OF ARGUMENT

The Court of Appeals properly enforced the limits on the Attorney General's discretion proscribed by Section 241(a)(1)(H) of the Immigration and Nationality Act when it reversed the decision of her delegate, the Board of Immigration Appeals, in this case. 8 U.S.C. 1251(a)(1)(H). The language of Section 241(a)(1)(H), its legislative history and development and its purpose circumscribe the parameters within which the Attorney General must exercise her discretion.

The inclusion of the language "otherwise admissible" in Section 241(a)(1)(H) reveals that Congress intended to remove any consideration of the elements of fraud that triggered the need for the waiver, both in determining initial eligibility and in assessing whether relief is warranted. See *Immigration and Naturalization Service v. Errico,*

385 U.S. 214 (1966). The history and development of Section 241(a)(1)(H) confirm the limitations proscribed by its language. From its inception, the primary purpose of the statute was to grant exceptions to the restrictive sections of the Act for the purpose of keeping families together. *Id.* at 220. Recent amendments to Section 241(a)(1)(H) have actually broadened the application of the waiver in an effort to insure that its humanitarian goals are met.

The Board's consideration of the elements of the Respondent's fraudulent entry in determining whether relief was warranted under Section 241(a)(1)(H) in the instant case contravened the language and purpose of the statute. Although relief under Section 241(a)(1)(H) is discretionary, discretion is not abdication and must be exercised within the limits set by Congress. In reversing the decision of the Board of Immigration Appeals, the Court of Appeals was performing its constitutionally required function to police the parameters of the authority delegated to the Attorney General under Section 241(a)(1)(H).

INTRODUCTION

The United States continues to thrive with the tremendous infusion of energy and talent of recent immigrants. However, the current anti-immigrant sentiment prevailing in the United States ignores these contributions and many others. In this climate, misperceptions abound. For example, much of the public believes that immigrants are more likely to receive public benefits than U.S. citizens, and that immigrants take away jobs from

U.S. citizens, when the opposite is actually true.[1] Immigrants today are perceived to be less educated than the native population, when, in fact, recent legal immigrants are more likely to hold a college degree (thirty-three percent) than natives (twenty percent).[2] Such misperceptions are typical of the current overreaction to immigration and only serve to fuel hostility toward this uniquely vulnerable group.[3]

It is especially when a particular group of individuals, such as recent arrivals to the United States, is the object of significant public and political anger that a vigorous and independent judiciary is required to function as a meaningful check on the actions of the executive branch charged with administering this country's laws.

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[1] In a 1994 study by the Urban Institute, it was shown that non-refugee immigrants of working age are considerably less likely to use welfare (2 percent) than natives of working age (3.7 percent). MICHAEL FIX & JEFFERY S. PASSEL, THE URBAN INSTITUTE, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 63 (1994). It was also shown that given expenditures on U.S. goods and services and the number of new businesses started, immigrants actually create more jobs than they fill. *Id.* at 47.

[2] *Id.* at 34.

[3] Another example of how immigration issues are distorted can be found in the statement of interest in the brief submitted by *amicus curiae* in support of the Petitioner. *Amicus* express interest in the instant case based on its concern for crime prevention. This stated interest is puzzling given that this case presents no criminal issues, and, in fact, involves the interpretation of an ameliorative provision based on family unification applied in the civil immigration context.

The Ninth Circuit Court of Appeals performed this crucial function when it reversed the decision of the Board of Immigration Appeals in this case.

ARGUMENT

THE ATTORNEY GENERAL EXCEEDED THE BOUNDS OF THE AUTHORITY DELEGATED TO HER UNDER SECTION 241(a)(1)(H) BY CONSIDERING THE ELEMENTS OF FRAUD FOR WHICH THE RESPONDENT SOUGHT FORGIVENESS IN MAKING HER WAIVER DETERMINATION.

Contrary to the contentions of the Petitioner, this is not a case in which the Court of Appeals encroached upon the unfettered discretion of the Attorney General to make family waiver determinations under Section 241(a)(1)(H) of the Immigration and Nationality Act (hereafter "INA" or "Act").[4] 8 U.S.C. 1251(a)(1)(H). Rather, this is a case in which the Attorney General exceeded the parameters of the authority delegated to her by Congress by considering illegal and impermissible factors in making the family waiver determination. It

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[4] As set forth in the Petitioner's Brief at p. 17, n.10, the Attorney General has delegated her authority to direct the administration of the INS and to enforce the INA and other laws relating to the immigration and naturalization of aliens to the Commissioner of the INS, 8 C.F.R. 2.1, and the Executive Office for Immigration Review, which includes the Board of Immigration Appeals (BIA), 8 C.F.R. 3.0, 3.1(a) and (b), and immigration judges, 8 C.F.R. 3.10, 242.8. All references to the Attorney General contained herein are made with regard to the Attorney General and her delegates.

does not involve the review of an application of the Attorney General's discretion to specific facts. Therefore, the Court of Appeals was properly enforcing the limits on the Attorney General's discretion proscribed by the statute when it reversed her decision in this case.

It is true that the Attorney General may, in her discretion, select factors to be considered in making waiver determinations under Section 241(a)(1)(H). However, the Attorney General's power to identify those factors is bounded by the authority delegated to her by the statute. The language of Section 241(a)(1)(H), its legislative history and its purpose circumscribe the parameters within which the Attorney General must exercise her discretion.

The Attorney General's assertion that Congress has placed no restrictions on the exercise of her discretion, and, therefore, has vested her with unfettered discretion to make family waiver determinations is wholly erroneous. The Attorney General's decision may be reversed whenever her actions are arbitrary, irrational, not in accordance with the law or rest on an impermissible basis. *Diaz-Resendez v. INS*, 960 F.2d 493, 495 (5th Cir. 1992); *Guillen-Garcia v. INS*, 60 F.3d 340, 344 (7th Cir. 1995). To determine whether her decision rests on an impermissible basis, the judiciary must assess whether the statute constrains the Attorney General's discretion, and, if so, to what extent. Under the circumstances presented in this case, the Court of Appeals correctly reversed the Attorney General's decision because she exceeded the limits of her authority by considering factors contrary to the language and purpose of Section 241(a)(1)(H) of the Act.

A. THE ATTORNEY GENERAL'S DISCRETION IS NOT UNFETTERED; HER DISCRETION MUST BE EXERCISED WITHIN THE PARAMETERS ESTABLISHED BY SECTION 241(a)(1)(H).

The Attorney General improperly frames the issue in this case as one involving a review of the exercise of her unfettered discretion to make waiver determinations under Section 241(a)(1)(H), and, therefore, contends the judiciary should have simply deferred to her decision. She asserts that her authority to forgive fraud or misrepresentations at the time of entry should be viewed as a "matter of grace," according to her "unfettered discretion." See Petitioner's Brief at 18-19. Further, she construes Section 241(a)(1)(H) to commit the selection of factors in making this determination entirely to her discretion. Given this statutory construction, she posits that she would be justified in considering, along with other positive and negative factors, the nature and gravity of the initial fraud or misrepresentation which renders the alien deportable in the first instance, but, that, in her discretion, she has adopted a more lenient policy in which she elects not to do so. See Petitioner's Brief at 24. In fact, both the Attorney General and the *amicus curiae* in support of the Attorney General appear to assert that the Attorney General's decision in this case is altogether unreviewable.

However, this case involves the Attorney General's statutory interpretation of Section 241(a)(1)(H) in identifying the factors to be considered in making a waiver determination, and, therefore, the issue presented is one of statutory construction. The inquiry must focus on

whether the Attorney General's exercise of discretion rests on an impermissible basis or exceeds the bounds of her authority. To make this determination, the judiciary must analyze Section 241(a)(1)(H) to identify whether the provision limits the Attorney General's exercise of discretion.[5] The judiciary, not the Attorney General, is the final authority on whether the Board of Immigration Appeals' (BIA or Board) interpretation of Section 241(a)(1)(H) was proper. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S.Ct. 2778 (1984).[6]

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[5] Even the case cited by Petitioner for the proposition that the discretion of the Attorney General with respect to suspension of deportation is like "a judge's power to suspend the execution of a sentence or a President's power to pardon a convict", *U.S. ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (Hand, J.), emphasizes that, "[I]t is a matter of grace *** ***unless – as we are assuming – it affirmatively appears the denial has been actuated by considerations that Congress could not have intended to make relevant.***" *Id.*

[6] Under this Court's holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842, when a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. The first question is always whether Congress has directly spoken to the precise issue presented. For, if the intent of Congress is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress and the analysis goes no further. *Chevron*, 467 U.S. at 842-43. If, however, the statute is silent or ambiguous, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.*

1. The Statutory Language Of Section 241(a)(1)(H) And Its Legislative History And Development Define The "Form" Within Which The Attorney General Must Exercise Her Authority.

The proper method of analysis to be utilized in assessing the Attorney General's interpretation of Section 241(a)(1)(H) is set forth in this Court's decision in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Just as in this case, the heart of the issue presented in *Cardoza-Fonseca* pertained to the parameters within which the then Attorney General could exercise his authority.

Specifically, at issue was whether the same standard of proof applied to claims to asylum under Section 208(a) and to claims to a withholding of deportation under Section 243(h) of the Act. 8 U.S.C. 1158(a), 1253(h). The BIA concluded that the same standard was applicable to both sections, and, therefore, that an alien must prove that he is "more likely than not" to be subject to persecution in his home country under Section 208(a). *Id.* at 423. The Ninth Circuit Court of Appeals rejected this interpretation of the statute. This Court affirmed the decision of the Court of Appeals.

The Attorney General's argument in *Cardoza-Fonseca* was twofold. First, the Attorney General argued that the structure of the Act itself dictated a decision in its favor. *Id.* at 443. Second, the Attorney General argued that the BIA's construction of the Act was entitled to substantial deference, even if the Court of Appeals' reading of the statute was more in keeping with Congress' intent. *Id.* at 445. This Court rejected both arguments stating, "the first

ignores the structure of the Act; the second misconstrues the federal courts' role in reviewing an agency's statutory construction." *Cardoza-Fonseca*, 480 U.S. at 443.

Citing *Chevron*, this Court emphasized that the issue presented was a question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, this Court concluded that Congress did not intend the two standards of proof to be identical. *Id.* at 446-447. Noting that the vesting of discretion in the Attorney General is typical in the immigration area, this Court, nonetheless, explicitly rejected the Attorney General's contention that the BIA's construction of the statute was entitled to substantial deference since the case was one of statutory construction. *Id.* at 444, 445.

Thus, this Court recognized that it was well within the province of the judiciary to enforce the limits on the Attorney General's authority set forth in the language of the statute. *Id.* at 448. While stopping short of giving substance to the term "well founded fear", this Court rejected the BIA's interpretation of the phrase and directed the agency to the appropriate sources from which it should derive the proper meaning. *Id.* at 432-43, 446. Those sources included the plain language of the statute, its legislative history and other sources of international law and scholarship. *Id.* at 432-43. In other words, this Court found that the Ninth Circuit properly policed the parameters of the Attorney General's authority proscribed by Congress under the statute.

In a separate concurrence, Justice Blackmun noted that, although the final contours of the standard are to be shaped by the standard's application to facts of specific

cases, ***the form of the standard was at first given by the statutory language and the intimations of the legislative history.*** *Id.* at 451-52 (Blackmun, J., concurring). Therefore, it was well within the province of the Court of Appeals to insure that the then Attorney General exercised his authority within that form.

Under the forgoing analysis, the Attorney General's interpretation of Section 241(a)(1)(H) must similarly be rejected here because the Attorney General's conclusion that the statute imposes no limits on her discretion "ignores the structure of the Act" and "misconstrues the federal courts' role in reviewing an agency's statutory construction." *Cardoza-Fonseca*, 480 U.S. at 443. As set forth below, the language of Section 241(a)(1)(H) and its legislative development form the parameters of the authority within which the Attorney General may make family waiver determinations. Accordingly, the Court of Appeals acted well within its authority in enforcing the boundaries of the Attorney General's exercise of her discretion.

a. The Language Of Section 241(a)(1)(H) And This Court's Decision In *INS v. Errico* Preclude Any Consideration Of The Wrong For Which The Alien Seeks Forgiveness.

In all cases involving statutory construction, the starting point must be the language employed by Congress. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). It is assumed that the legislative purpose is expressed by the ordinary meaning of the words used. *INS v. Elias-Zacarias*, 502 U.S.

478, 482 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. at 189. Section 241(a)(1)(H) of the INA provides that an alien who has procured his or her entry into the United States by fraud or misrepresentation, either willful or innocent, may seek a waiver of deportation if that alien:

> (i) is the spouse parent son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and
>
> (ii) was in possession of an immigrant visa or equivalent document and was ***otherwise admissible*** to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs 5(A) and 7(A) of section 1182 of this title which were a direct result of that fraud or misrepresentation.

8 U.S.C. 1251(a)(1)(H) (***emphasis added***).

The Attorney General contends that this language merely sets forth the "eligibility requirements" for the application of the family waiver and places *no* restrictions whatsoever on the factors that may be considered by the Attorney General and her delegates in making a waiver determination. Petitioner's Brief at 16-17. The Attorney General concludes, therefore, "that section 241(a)(1)(H) on its face, vests the Attorney General with essentially unfettered discretion." Petitioner's Brief at 17. However, this argument ignores the meaning of the phrase "otherwise admissible" and this Court's decision in *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966).

It is true that Section 241(a)(1)(H) sets forth the requirements necessary for the application of a family

waiver. It provides, in pertinent part, that the applicant must be a spouse, parent, or child of a citizen or a lawful permanent resident, and that the applicant was in possession of an immigrant visa or equivalent document and was *"otherwise admissible"* at the time of entry. 8 U.S.C. 1251(a)(1)(H). Given its plain and ordinary meaning, the use of the language "otherwise admissible" reveals that Congress intended to remove any consideration of the elements of fraud triggering the need for the waiver, both in determining initial eligibility and in assessing whether the applicant merits discretionary relief.

This meaning is clear in light of the very structure of Section 241(a)(1)(H), which provides that an alien who has "procured his or her entry into the United States by fraud or misrepresentation, either willful or innocent" may seek a waiver of deportation if that alien has the requisite family ties and was "otherwise admissible" – meaning admissible aside from the elements of the fraudulent entry. A fraudulent entry necessarily involves several steps in its planning and execution. The structure of the statute reveals that the separate elements of the fraud or misrepresentations made as a part of a fraudulent scheme to enter the United States should not be held against the alien in making the family waiver determination. Any other construction of Section 241(a)(1)(H) would render the phrase "otherwise admissible" meaningless.

In fact, the meaning of the phrase "otherwise admissible" was examined by this Court in *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966). In that case, the Board of Immigration Appeals affirmed a deportation order against an alien who had falsely represented

that he was a skilled mechanic with specialized experience in repairing foreign automobiles. On the basis of that misrepresentation, he was granted first preference quota status and entered the country with his wife in 1959. The couple had a child in 1960 who acquired U.S. citizenship at birth. The government began deportation proceedings against Errico in 1963. Errico argued that the provisions of Section 241(f) of the INA (now 241(a)(1)(H)) saved him from deportation.

The BIA ruled that relief under Section 241(f) was not available because Errico had not complied with quota requirements, and, hence, was not "otherwise admissible at the time of entry".[7] *Errico*, 385 U.S. at 216. The Ninth Circuit Court of Appeals held that the construction of the statute adopted by the Board would strip it of practically all meaning, since a material misrepresentation would presumably be given to conceal some factor that would bear on admissibility, and reversed the BIA decision. *Id.*

After close attention to the language of 241(f) and its predecessor, as well as the legislative history of those provisions, a majority of this Court concluded:

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[7] Under the Attorney General's position in this case, the BIA could have considered all the separate elements of Errico's fraudulent entry, including his evasion of the quota requirements, his own fraudulent entry, and his wife's fraudulent entry which was gained through his. However, it does not appear that the Attorney General unnaturally divided Errico's conduct into separate elements of fraud to be weighed as negative factors. See *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966). For a detailed discussion of the Attorney General's inappropriately narrow definition of "fraud", see Section III of the Respondent's Brief.

> This language would be meaningless if an alien who committed fraud for the purpose of evading quota restrictions would be deportable as not 'otherwise admissible at the time of entry.'

Id. at 222-23. This Court emphasized that it was clear from the language of Section 241(f) that aliens who are close relatives of U.S. citizens are not required to comply with quota restrictions to escape deportation for their fraud and that nothing in the legislative history suggested Congress had a contrary result in mind. *Id.* at 223.

Thus, this Court recognized that for the statute to achieve its purpose, the "wrong" for which the applicant sought to be forgiven must be set aside in determining whether the applicant merits relief. In so ruling, this Court noted that the INA was not a punitive statute and that Section 241(f), in particular, was designed to accomplish a humanitarian result – uniting families. *Id.* at 225. Even Justice Stewart, in his dissent, agreed that the plain meaning of the phrase "otherwise admissible" required that fraud be removed as a ground for deportation. *Id.* at 229 (Stewart, J., *dissenting*).[8]

The *Errico* court's reading of the plain meaning of the phrase "otherwise admissible" remains valid today. Although Section 241(f) has been amended since the *Errico* decision, the phrase "otherwise admissible" has

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[8] Similarly, in *Liwanag v. INS*, 872 F.2d 685, 687 (5th Cir. 1989), the Court of Appeals stated that the waiver "presupposes that the petitioner has committed an act justifying deportation. In its brief, the INS concedes that the original fraudulent act should not be considered as an adverse factor in the balancing equation."

been preserved, and, in fact, the application of the waiver has been expanded.[9] At no time has Congress expressed a desire to depart from this Court's interpretation of the plain meaning of the phrase or from the humanitarian goal of uniting families originally sought to be achieved by the inclusion of such language.

It is clear from the plain meaning of Section 241(a)(1)(H) that Congress set limits on the Attorney General's exercise of discretion in making family waiver determinations. Thus, the Attorney General's assertion that the statute does not limit her discretion is contrary to the plain meaning of Section 241(a)(1)(H) and the clear intent of Congress.[10]

Therefore, the Court of Appeal's reversal of the BIA's decision in this case does not reflect an encroachment upon the authority of the Attorney General to select and weigh factors, but, rather, a proper exercise of its function to police the boundaries within which the Attorney General may exercise her discretion. The Court of Appeals properly rejected the Attorney General's construction of Section 241(a)(1)(H), which is contrary to the plain meaning and purpose of the statute.

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[9] A detailed analysis of the history, development and expansion of Section 241(a)(1)(H) is contained in Section I of Respondent's Brief.

[10] The plain meaning of the statute is clear without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)

b. The Legislative History And Development Of Section 241(a)(1)(H) Is Consistent With The Limitations On The Attorney General's Discretion Formed By The Statute.

The limitations set by the plain meaning of the language of Section 241(a)(1)(H) are only confirmed by an examination of its history and development. A thorough and detailed analysis of the history and development of Section 241(a)(1)(H) is contained in Section I of the Respondent's Brief and will not be set forth again here. However, it should be emphasized that from its inception, Section 7 of the 1957 Act, which later evolved into Section 241(f) and then Section 241(a)(1)(H), was intended "plainly to grant exceptions to the rigorous provisions of the 1952 Act *for the purpose of keeping family units together.*" *INS v. Errico*, 385 U.S. 214, 220 (1966). Describing the purpose underlying Section 241(a)(1)(H), the *Errico* Court stated:

> Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.

Id.

Consistent with this intent, the waiver and its application have been broadened by amendments to the Act in 1981 and again in 1990. See Section I of Respondent's Brief. Therefore, the Attorney General's restrictive application of the waiver in this case, which involved the consideration of elements of the initial fraudulent entry,

contravened the intent of Congress in creating and expanding the waiver.

2. The Authority Cited By The Attorney General Is Unpersuasive And Only Serves To Establish That The Court Of Appeals Acted Correctly In Reversing The Attorney General's Decision.

Most of the cases cited by the Attorney General in support of her position are not cases involving the interpretation of a statutory provision and the enforcement of the statutory limits on her authority to identify the factors to be considered in the exercise of her discretion. Rather, the balance of the cases cited in the Petitioner's Brief involve judicial review of the application of the Attorney General's discretion to the facts of specific cases. See *e.g. Jay v. Boyd*, 351 U.S. 345, 76 S.Ct. 919 (1956); *Foti v. Immigration and Naturalization Service*, 375 U.S. 217, 84 S.Ct. 306 (1963); *INS v. Rios-Pineda*, 471 U.S. 444, 105 S.Ct. 2098 (1985); *INS v. Doherty*, 502 U.S. 314, 112 S.Ct. 719 (1992). This distinction is critical to a proper analysis of the issues in this case because the latter does not require an analysis of the statutory provision at issue, a function involving heightened judicial review and less deference to the Attorney General's decision. Moreover, two of the cases relied upon by the Attorney General in which the interpretation of a statute was at issue, *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curium) and *United States v. Alaska*, 503 U.S. 569, 576 (1992), actually support the Court of Appeal's decision in this case.

At issue in *Wang* was the propriety of the Court of Appeals' decision to order that deportation proceedings be reopened. The *Wang* case appears to support the Attorney General's position in this case because it was ultimately determined that the Court of Appeals had encroached upon the authority of the Attorney General in ordering that the case be reopened. However, the opposite is true. *Wang* demonstrates that, in determining whether the Attorney General acted properly, her actions must be evaluated in light of the meaning of the language employed and the intent of Congress.

The respondents in *Wang* were ordered deported in November 1974 and were granted the privilege of voluntarily departing by February 1, 1975. *Wang*, 450 U.S. at 141. Instead of departing voluntarily, they applied for an adjustment under Section 245 of the Act, 8 U.S.C. 1255, but were found ineligible on July 17, 1975. *Id.* at 141-42. Their appeal from this ruling was dismissed by the BIA in October 1977. Respondents, by that time, had satisfied the 7-year continuous-physical-presence requirement under Section 244 of the Act and filed a second motion to reopen to hear the suspension of deportation claim. *Id.* at 142.[11]

Section 244 of the INA provides that the Attorney General may, in her discretion, suspend deportation and adjust the status of an otherwise deportable alien who: (1)

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[11] Unlike the relief sought in this case, the relief sought by the respondent in *Wang* – a reopening of proceedings – is not provided for by Congress in the INA itself. Rather, such relief is provided for only in the regulations promulgated by the Attorney General under the Act.

had been physically present in the United States for not less than seven years; (2) is a person of good moral character; and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1254(a)(1). The Wangs' motion contained unverified allegations that the deportation would result in extreme hardship to their children and would also be an economic hardship to the entire family. *Wang*, 450 U.S. at 142. The BIA denied the motion to reopen without a hearing, finding that respondents failed to establish a *prima facie* case to entitle them to discretionary relief under the Act. *Id.* at 142-43. The Court of Appeals, sitting *en banc*, reversed and remanded for a hearing under Section 244 of the Act. *Id.* at 143.

This Court concluded that the Court of Appeals erred in reversing the case in two respects. First, the Court of Appeals ignored the regulation that required the alien seeking suspension to allege and support by affidavit, or other evidentiary material, the particular facts claimed to constitute extreme hardship. *Id.* at 143. Second, and more importantly, the Court of Appeals encroached on the authority which the Act confers on the Attorney General. *Id.* at 144.

This Court looked to the then Attorney General's interpretation of the words "extreme hardship", noting that his construction and application of this standard should not be overturned by a reviewing court merely because it prefers another interpretation. *Id.* at 145.

Acknowledging that the Attorney General's interpretation was narrow, the Court emphasized that such a narrow interpretation was consistent with the "extreme hardship" language, which itself indicated the exceptional nature of the suspension remedy. *Id.* Thus, this Court concluded that the BIA did not exceed the parameters of the authority delegated by the Act, and that the Court of Appeals erred in ordering the case reopened.

In stark contrast, here, the Attorney General's interpretation of Section 241(a)(1)(H) renders the phrase "otherwise admissible" meaningless and is inconsistent with the legislative history and development of the provision. As the discussion above demonstrates, no matter the context, when the interpretation of a statutory provision is at issue, it is the language of the statute, and its legislative history, development and purpose that are the decisive considerations. See also *INS v. Phinpathya*, 464 U.S. 183 (1984) (*rejecting the Court of Appeals construction of the continuous-physical-presence requirement of Section 244(a) of the Act and finding that such a construction was contrary to the plain meaning of the statute and the intent of Congress.*)

Likewise, a closer look at *United States v. Alaska*, 503 U.S. 569, 576 (1992), a case relied upon by the Petitioner for the proposition that she has unfettered discretion to grant or withhold relief from deportation, reveals that it, too, lends support to the decision of the Court of Appeals in this case. In *United States v. Alaska*, this Court examined Section 10 of the Rivers and Harbors Appropriation Act (RHA) to determine whether the Secretary of the Army acted within his discretion in conditioning approval of

the construction of a port in Nome, Alaska on a disclaimer by the State of Alaska relating to a potential change in the federal-state boundary as a result of the project. *Id.* at 572. Ultimately, this Court determined that the Secretary acted within his discretion, but only after engaging in the required statutory construction analysis, which the Attorney General claims is unnecessary in this case.

First, this Court looked to the language of Section 10 itself to determine whether it contained any criteria by which the Secretary was to make an authorized decision. *Id.* at 576. Unlike the language of Section 241(a)(1)(H), the language of Section 10 did not contain any limits on the Secretary's discretion. Next, this Court looked to the legislative history of Section 10 to determine whether it contained a "hint" of whether the drafters sought to vest in the Secretary the apparently unbridled authority the plain language of the statute seemed to suggest. *Id.* Unlike this case, the legislative history and statutory antecedents offered little insight into the intent of Congress.

Thus, only *after* examining the plain meaning of the statute and its legislative history and *finding no limits* on the Secretary's discretion, did this Court conclude that the Secretary acted within the bounds of the discretion conferred upon him by the statute. In marked contrast, here, as set out in great detail in the Respondent's Brief, an examination of the plain meaning of the statute, as well as its legislative history, development and purpose, reveals that the Attorney General exceeded the authority to make family waiver determinations delegated to her by the statute because she considered the very elements

of fraud in making her determination that the Act itself precludes from consideration.

The Attorney General's analogies to other waiver provisions contained in the INA are equally unpersuasive. Specifically, the analogies to waivers under Section 212(c) and suspensions of deportation under Section 244(a) are inappropriate because the language, history and purpose of those sections are so unlike that of Section 241(a)(1)(H). Those provisions do not contain the "otherwise admissible" language of 241(a)(1)(H).[12]

It is well recognized that:

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Cardoza-Fonseca, 480 U.S. at 432; *quoting Rusello v. United States*, 464 U.S. 16, 23 (1983), *quoting U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). Thus, the fact that only Section 241(a)(1)(H) contains the language "otherwise admissible" indicates that the sections differ in meaning and application and the Attorney General's analogies between the sections are false.

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[12] A detailed discussion of the differences in the language, history and purpose of sections 212(c), 241(a)(1)(H) and 244, is set forth in Section IV of Respondent's Brief.

B. OUR SYSTEM OF GOVERNMENT REQUIRES THE JUDICIARY TO POLICE THE PARAMETERS OF THE AUTHORITY DELEGATED TO AGENCIES.

Under our system of separation of powers, independent judicial review is required to insure that the wielders of governmental power are subject to the limits of law. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 938 (1988). The applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary. *Id.*; see *The Federalist No. 78* (A. Hamilton) (C. Rossiter ed. 1961). This is the role filled by Article III courts.

These courts were created because the framers of the Constitution believed that arbitrariness and tyranny could result from the excessive concentration of power in a single branch of government. In fact, James Madison wrote that "[T]he accumulation of all powers, legislative, executive and judiciary, in the same hands * * * [is] the very definition of tyranny." *The Federalist No. 47*, at 301 (J. Madison) (C. Rossiter ed. 1961). Under our system of government, independent judicial review is a constitutionally required check on the authority delegated to executive agencies by Congress.

Toward that end, this Court has stated that, when reviewing agency interpretations of law, courts must not "slip into * * * judicial inertia" or simply "rubber stamp" agency decisions. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983), *quoting American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *NLRB v. Brown*, 380

U.S. 278, 291-92 (1965). Deference is not abdication and even discretion has its legal limits. See *INS v. Doherty*, 502 U.S. 314, 330 (1992) (Scalia, J., concurring in part and dissenting in part); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring).

Congress, not the Attorney General, enacted Section 241(a)(1)(H) as a humanitarian measure designed to keep families together. Congress, not the Attorney General, defined the outer limits of the Attorney General's authority by making the policy determination that an alien could avoid deportation based on his or her acts of fraud if the alien possessed the requisite family ties. Section 241(a)(1)(H) was designed specifically to allow an alien to escape deportation in spite of his or her fraudulent entry into the country if the alien has a family member who is a U.S. citizen or a lawful permanent resident, and if the alien would have been admissible aside from the alien's acts of fraud or misrepresentations. The inclusion of the language "otherwise admissible", reflects a legislative intent to remove the elements of fraud or misrepresentations from the analysis in making a waiver determination. Thus, the Court of Appeals was merely performing its constitutionally required role of policing the limits of the authority delegated to the Attorney General by the statute when it reversed the BIA's decision in this case.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Pursuant to Rule 25.5 of the Rules of this Court, the Solicitor General respectfully files this supplemental brief to bring to the Court's attention certain provisions of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, which was approved by the President on September 30, 1996. Division C of that law consists of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA) (reproduced at 142 Cong. Rec. H11,787 (daily ed. Sept. 28, 1996)). As we explain below, those provisions do not affect the merits of this case or the Court's jurisdiction to entertain it.

The question presented in this case is whether the Attorney General, when deciding whether to grant a

discretionary waiver of deportation under Section 241(a)(1)(H) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(H),[1] may take into account acts of fraud that the alien committed before and after his fraudulent entry into the United States. The Board of Immigration Appeals (Board) held that the immigration judge, while disregarding respondent's fraud at entry, had properly considered, as adverse factors relevant to the discretionary determination of whether to grant a waiver, respondent's other acts of fraud committed before and after that unlawful entry. Pet. App. 9a-11a. Respondent sought judicial review under Section 106 of the INA, 8 U.S.C. 1105a, and the court of appeals vacated the Board's decision and remanded the case for further proceedings. The court held that the Board erred in considering respondent's various frauds because the court viewed those acts as part of, or extensions of, respondent's fraud at entry. Pet. App. 2a-3a.

Section 306(b) of the IIRA repeals Section 106 of the INA, 8 U.S.C. 1105a, the provision under which respondent obtained judicial review in this case. Section 306(a) of the IIRA enacts a new Section 242 of the INA (8 U.S.C. 1252) to govern judicial review in the future. The new 8 U.S.C. 1252 contains a provision that specifically precludes judicial review of decisions or actions the authority for which is committed, under the INA, to the discretion of the

[1] Section 305(a) of the IIRA redesignated Section 241 of the INA, 8 U.S.C. 1251, as Section 237 of the INA, 8 U.S.C. 1247. That redesignation, along with most amendments made by Title III-A of the IIRA, will take effect the first day of the first month beginning more than 180 days after enactment, or on April 1, 1997. See IIRA § 309(a); pages 5-6, *infra*.

Attorney General. As amended, Section 242(a)(2)(B), 8 U.S.C. 1252(a)(2)(B), provides:

> DENIALS OF DISCRETIONARY RELIEF.—Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 212(h), 212(i),[2] 240A, 240B, or 245, or
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [asylum for refugees].

Paragraph (ii) will remove from the federal courts any jurisdiction to review decisions of the Attorney General that, like the decision on review in the instant case, deny an alien a discretionary waiver of deportation under what is now Section 241(a)(1)(H) of

[2] This preclusion of review under Section 212(i) of the INA is repeated in Section 212(i) itself, as amended by the IIRA. Section 349 of the IIRA amends Section 212(i) of the INA, 8 U.S.C. 1182(i), which provides for a parallel discretionary waiver of exclusion based on fraud. See Gov't Br. 23-27. Section 212(i)(2), as amended, specifies that "[n]o court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver" of exclusion based on fraud. That special preclusion of review (which is not contained in Title III-A of the IIRA) appears to be effective immediately.

the INA, 8 U.S.C. 1251(a)(1)(H).[3]

Subsection (c) of Section 306 of the IIRA sets forth the effective dates for the amendments to the judicial review provisions of the INA that were made by subsections (a) and (b) of Section 306. Section 306(c)(1) states that, in general,

> the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act and subsection (g) of section 242 of the [INA] (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

Under this provision, as it now stands, in cases in which the Board decision denying a waiver or other discretionary relief and ordering deportation (removal) is filed on or after September 30, 1996, former Section 106 of the INA will not afford an avenue for judicial review and no court will have jurisdiction to review the Board's grant or denial of discretionary relief. Section 306 of the IIRA does not affect, however, judicial review of Board decisions denying discretionary waivers of deportation, such as the

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[3] The new Section 242(g) of the INA (8 U.S.C. 1252(g)) reinforces that conclusion. It provides:

> EXCLUSIVE JURISDICTION.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

decision in the instant case, that were entered and subject to judicial review prior to September 30, 1996.[4]

On October 4, 1996, Congress passed a bill (S. 2197) that includes a "Technical Correction" to Section 306(c)(1) of the IIRA. That correction would amend Section 306(c)(1) to state that, in general:

> the amendments made by subsections (a) and (b) shall apply *as provided under Section 309*, except that subsection (g) of section 242 of the [INA] (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

See 142 Cong. Rec. H12,294 (daily ed. Oct. 4, 1996) (emphasis added). If this provision is approved by the President, then under Section 309(a) of the IIRA, the effective date for Sections 306(a) and (b) (like the rest of Subtitle III-A of the IIRA) will be "the first day of the first month beginning more than 180 days after the date of the enactment" of the IIRA ("the title III-A effective date").

Section 309(c)(1) of the IIRA further provides that (subject to certain special transitional rules for judicial review in Section 309(c)(4)), "in the case of an alien who is in exclusion or deportation proceedings as of [or before] the title III-A effective date," the

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[4] Section 306(c)(2) of the IIRA also specifies that Section 306(c)(1) "shall not be considered to invalidate or to require the reconsideration of any judgment or order entered under section 106 of the Immigration and Nationality Act, as amended by section 440 of Public Law 104-132." By virtue of this provision as well, the judgment of the Ninth Circuit in this case is not affected by the IIRA, and this Court has jurisdiction to review that judgment.

amendments made by title III-A shall not apply and "the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments"—*i.e.*, under prior law.[5]

Thus, if the President approves the bill containing the technical correction of the effective date in Section 306(c)(1) of the IIRA, the preclusion of review in the new 8 U.S.C. 1252(a)(2)(B) of decisions of the Attorney General under Section 241(a)(1)(H) of the INA will not apply in any case in which the administrative exclusion or deportation proceedings were instituted prior to April 1, 1997. But *cf.* IIRA § 309(c)(4)(E) (precluding judicial review of certain other discretionary determinations during transition period). As a result, decisions in deportation cases that enter the administrative pipeline over the next six months in which the alien seeks a waiver of deportation under Section 241(a)(1)(H) of the INA will continue to be subject to judicial review under the conflicting circuit precedents that we cite in our certiorari petition and briefs on the merits, and judicial review in any such cases in the Ninth Circuit will be governed by that court's decision in the instant case. For that reason, and because this case has been fully briefed and set for oral argument, we believe the Court should resolve the important question presented. The plainly erroneous decision below, which announces unwarranted limitations on the Attorney General's exercise of her discretion

[5] Even in the absence of the technical corrections amendment, there may be some question whether (or to what extent) the effective date provisions in Section 309 would apply to the judicial review provisions enacted in Section 306 in any event. Compare IIRA § 309(a) with IIRA § 309(c)(1) and (4).

under the INA, should not be permitted to cast a shadow over the administration of the INA into the future.[6]

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

[6] On September 19, 1996, respondent filed a motion with the Board to reopen his case to apply for adjustment of status. We have been informed that respondent's motion was returned for a technical defect in the fee payment. Respondent submitted a copy of the motion to this Court. The INS filed an opposition to that motion on October 2, 1996, and we are lodging a copy of that filing with the Court along with the filing of this brief. Respondent seeks relief under Section 212(i) of the INA in connection with his request for adjustment of status. Although the IIRA amends Section 212(i) (see note 2, *supra*), it does not appear at this time that the amendment would affect the merits of respondent's application. Respondent's motion to the Board for reopening has no bearing on the issues before this Court.